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# Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject Matter Jurisdiction, and the Freedom of the Church

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### Recommended Citation

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**Civil Procedure and the Establishment Clause:  
Exploring the Ministerial Exception, Subject Matter Jurisdiction, and the  
Freedom of the Church**

**Gregory A. Kalscheur, S.J.\***

Abstract

*What sort of defense is provided by the ministerial exception to employment discrimination claims? The ministerial exception bars civil courts from reviewing the decisions of religious organizations regarding the employment of their ministerial employees. While the exception itself is widely recognized by courts, there is confusion with respect to the proper characterization of the defense provided by the exception: should it seen as a subject matter jurisdiction defense, or as a challenge to the legal sufficiency of the plaintiff's claim? This Article argues that articulating the right answer to this question of civil procedure is crucial to a proper understanding of the role that the ministerial exception plays as a constitutional protection for the religious freedom of churches and other religious institutions. The Article explores the ministerial exception to antidiscrimination law as a case study of the extent to which the U.S. Constitution adequately protects the freedom of the church. The ministerial exception is best understood as a subject matter jurisdiction defense, and getting the right answer to this civil procedure question is not just a matter of citing the right procedural rule in the defendant's motion to dismiss. Instead, careful attention to this question leads to a better understanding of the foundations of our constitutional order. When courts clearly and consistently treat the ministerial exception as a limitation on their subject matter jurisdiction, they make a powerful statement about the foundations of limited government – they affirm the penultimacy of the state. Yet, even though the jurisdictional approach to the ministerial exception does provide crucial protection for one dimension of institutional religious freedom, the Article suggests that the jurisdictional approach alone cannot provide an adequate constitutional foundation for robust protection of the freedom of the church.*

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## INTRODUCTION

What sort of defense is provided by the ministerial exception to employment discrimination claims? The ministerial exception “bars civil courts from reviewing decisions of religious organizations relating to the employment of their ministers.”<sup>1</sup> Invoking this doctrine, courts routinely dismiss claims of race and sex discrimination brought by ministers against their religious employers under Title VII and other federal and state anti-discrimination laws.<sup>2</sup> The doctrine serves to protect religious organizations from secular control or manipulation in the choice of employees who perform spiritual functions by “preclude[ing] any inquiry whatsoever into the reasons behind a church’s ministerial employment decision.”<sup>3</sup> Rooted in the First Amendment’s protection for

<sup>1</sup> *Hollins v. Methodist Healthcare, Inc.*, 379 F. Supp.2d 907, 911 (W.D. Tenn. 2005), *aff’d*, 474 F.3d 223 (6<sup>th</sup> Cir. 2007). The Seventh Circuit, in an opinion by Judge Posner, recently suggested that the doctrine might better be characterized as the “internal affairs” doctrine, because “[t]he assumption behind the rule ... is that Congress does not want courts to interfere in the internal management of churches.” *Schleicher v. Salvation Army*, 2008 WL 516892 (7<sup>th</sup> Cir. Feb. 28, 2008) at \*2. The doctrine protects churches from courts telling them “whom to ordain (or to retain as an ordained minister), how to allocate authority over the affairs of the church, or which rituals and observances are authentic. . . . That is why the ministers exception is better termed the ‘internal affairs’ doctrine.” *Id.* While Judge Posner’s suggestion accurately reflects the fundamental purpose of the doctrine, this Article will follow the practice of most courts in referring to the doctrine as the “ministerial exception.”

<sup>2</sup> *See, e.g., Boggan v. Mississippi Conf. of the United Methodist Church*, 222 Fed.Appx. 352 (5<sup>th</sup> Cir.), *cert denied*, 128 S. Ct. 63 (2007) (dismissing Title VII and § 1981 race discrimination claims); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343 (5<sup>th</sup> Cir. 1999) (dismissing Title VII sex discrimination claim); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4<sup>th</sup> Cir. 1985) (dismissing Title VII race and sex discrimination claims); *Cronin v. South Indiana Annual Conference, United Methodist Church*, 2007 WL 2258762 (S.D. Ind. Aug. 3, 2007) (dismissing claim under Title VII and the Americans with Disabilities Act); *O’Connor v. Church of St. Ignatius Loyola*, 779 N.Y.S.2d 31 (N.Y.A.D.), *leave to appeal denied*, 820 N.E. 2d 292 (N.Y. 2004), *cert. denied*, 544 U.S. 1017 (2005) (dismissing employment discrimination claims).

<sup>3</sup> *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4<sup>th</sup> Cir. 2000).

religious freedom, the exception recognizes that the Constitution protects “the unfettered right”<sup>4</sup> of a church to make such employment decisions.

While the protection recognized by the exception has itself been widely accepted by the federal and state courts, the proper characterization of the defense provided by the exception is a question on which courts disagree.<sup>5</sup> Is the ministerial exception a subject matter jurisdiction bar to consideration of the plaintiff’s claim, or is it a challenge to the legal sufficiency of the plaintiff’s claim? I will argue in this Article that articulating the right answer to this question of civil procedure is crucial to a proper understanding of the role that the ministerial exception plays as a constitutional protection for the religious freedom of churches and other religious institutions. This technical question of civil procedure thus implicates a foundational principle of constitutional order.

Citizens with a commitment to religious freedom might reasonably assume that institutional religious freedom – the freedom of the church to be the church – lies at the heart of the religious freedom protected by the First Amendment.<sup>6</sup> Yet constitutional protection for the freedom of religious institutions to carry out their institutional religious missions seems to be under assault today. This assault draws constitutional support from the United States Supreme Court’s decision in *Employment Division v. Smith*,<sup>7</sup> where the Court held that neutral laws of general application do not run afoul of the Free Exercise

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<sup>4</sup> Rayburn, 772 F.2d at 1169.

<sup>5</sup> See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294, 302-03 (3d Cir. 2006), *cert denied*, 127 S. Ct. 2098 (2007); see also *Petition for a Writ of Certiorari, Petruska v. Gannon Univ.*, 2007 WL 128608 (U.S. Jan. 16, 2007), at \*17 n. 3 (noting an emerging split on whether ministerial exception claims present a jurisdictional bar). Cf. *Schleicher*, 2008 WL 516892, at \*5 (arguing that the exception should be understood as a merits defense that should be resolved on a motion for judgment on the pleadings, see FED. R. CIV. PRO. 12(c), rather than a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction).

<sup>6</sup> Carl H. Esbeck, *The 60<sup>th</sup> Anniversary of the Everson Decision and America’s Church-State Proposition*, 23 J.L. & RELIGION 15, 41 (2007-08) (The central value of the First Amendment is, then, freedom in two senses – not only the cause of conscience in spiritual matters, but also including ...the necessity of having the government step back so as to let the church be the church.”).

<sup>7</sup> 494 U.S. 872 (1990).

clause even when those laws impose significant burdens on religious practice.<sup>8</sup> The Court in *Smith* refused to recognize any constitutionally required free exercise exemption from Oregon's drug laws for the religiously inspired use of peyote, even though the ingestion of peyote for sacramental purposes is a central component of worship in the Native American Church.<sup>9</sup>

Following *Smith*, courts have held that states are empowered to tell religious entities that their religiously motivated activities in society must comply with prevailing notions of morality that are embodied in the law, even when those laws come into conflict with the religious entities' doctrinal commitments. Thus, for example, relying on *Smith*, courts have required religiously affiliated social service agencies to comply with legislative mandates to include contraceptive coverage in their employees' prescription drug benefits.<sup>10</sup> In light of *Smith*, these rulings come "as no great surprise,"<sup>11</sup> but they have implications extending beyond mandatory contraceptive coverage statutes. As Professor Susan J. Stabile has noted, the legislation unsuccessfully challenged by religious employers in these cases establishes a "dangerous precedent":

[it] fails to respect the integrity of religious institutions, [thus] threatening the Church's autonomy and right of self-definition. ... The legislation in question raises a fundamental question of who decides what a religious institution is, and

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<sup>8</sup> See 494 U.S. at 878-882.

<sup>9</sup> *Id.* at 874; see also *id.* at 903-04 ("Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. ... Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out their religious beliefs and avoidance of criminal prosecution.") (O'Connor, J., concurring in the judgment).

<sup>10</sup> See *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 465 (N.Y. 2006) (*Smith* is an insuperable obstacle to plaintiffs' federal free exercise claim.), *cert.denied sub nom.*, *Catholic Charities of the Diocese of Albany v. Dinallo*, 128 S. Ct. 97 (2007); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81-90 (Cal. 2004) (discussing the applicability of *Smith*), *cert. denied*, 543 U.S. 816 (2004).

<sup>11</sup> Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 744 (2005) .

who defines the institution's mission. It also sets a dangerous precedent for even greater intrusions on religion in the future.<sup>12</sup>

In contrast to these recent contraceptive mandate decisions, courts have uniformly held that a religious institution's ministerial employees cannot invoke federal or state statutes that forbid employment discrimination on the basis of race and sex in order to challenge the employment decisions made by their religious employers. Yet such anti-discrimination statutes are neutral laws of general application. *Smith*, therefore, can be read to support the conclusion that ministers seeking to bring sex or race discrimination claims against the religious institutions that employ them should not be barred from

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<sup>12</sup> *Id.* at 745. The issues raised by these legislative mandate cases are not, of course, unique to Catholicism. Baptist institutions, for example, joined with Catholic Charities and other Catholic entities in challenging the New York contraception coverage mandate. *See* Serio, 859 N.E. 2d at 462-63. Yet the extensive network of Catholic social service institutions makes the question of institutional religious freedom particularly acute for the Catholic Church. The stakes are high:

The Catholic Church understands itself to be at the service of the human family, and the most tangible expression of that spirit is the network of charitable and social service institutions run by the church: schools, shelters, clinics, hospitals, counseling centers, and so on. That service, however, takes place in a pluralistic, secular culture governed by laws which do not always reflect the social and moral doctrine of Roman Catholicism. One perennial issue for Catholic institutions, therefore, is the extent to which they can adapt themselves to secular mores in order to serve the largest population possible, without losing their Catholic identity. ... The open question is to what extent the secular culture will be willing to bend to accommodate the deeply held moral beliefs of religious groups; and to what extent the Catholic Church, riding a strong wave of identity concerns, will feel the need to disentangle its institutions from partnerships with humanitarian groups or government agencies for fear of complicity in values at odds with church teaching.

John Allen, *Keynote Address, Symposium on the Jurisprudential Legacy of John Paul II*, 45 J. CATH. LEGAL STUD. 229, 239 (2006). This need to avoid complicity in values at odds with church teaching led Catholic Charities in the Archdiocese of Boston to discontinue providing adoption services under a contract with the state Department of Social Services, because Massachusetts law prohibits discrimination according to sexual orientation in the placement of adopted children. The Archdiocese concluded that Catholic Charities could not cooperate with the placement of children with same-sex couples without violating the church's teaching against legal recognition of same-sex unions. *Id.* In the absence of a legislative exemption from the general state law prohibiting discrimination on the grounds of sexual orientation, Catholic Charities chose to cease providing an important social service, which it had been providing for over 100 years. Since its founding, Catholic Charities had placed more children in homes than any other agency in the state, and it was widely respected as the "top private provider of adoptive homes for hard-to-place foster children." Patricia Wen, *"They Cared for the Children"; Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, at A1 (June 25, 2006); Patricia Wren, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, at A1 (March 11, 2006) (noting that "[t]he agency was especially adept at finding homes for so-called 'special needs' adoptions, which include children who are older or who have significant physical or emotional disabilities").

doing so.<sup>13</sup> If the Court was willing in *Smith* to allow a state to criminalize the sacramental ingestion of peyote in the context of worship within the Native American Church, why should the government be prevented from requiring religious employers to bring their ministerial selection criteria into line with the requirements of neutral and generally applicable anti-discrimination law?<sup>14</sup> Isn't "[e]nding centuries of discrimination"<sup>15</sup> on the basis of sex at least as important a goal as stemming the dangers that flow from the use of peyote? Nonetheless, even in the wake of *Smith*, "courts and commentators still find it unimaginable that the Catholic Church or [the] Southern Baptist Convention might be required to comply with antidiscrimination law. At some visceral level, it is considered an impossibility."<sup>16</sup>

The ministerial exception is the legal doctrine invoked to protect religious institutions from the requirements of antidiscrimination law in the ministerial employment context. First recognized by the Fifth Circuit in *McClure v. Salvation Army*,<sup>17</sup> the exception has been widely adopted by the state and federal courts – although the U.S. Supreme Court itself has neither recognized nor rejected the ministerial

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<sup>13</sup> See Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM. L. REV. 1965, 1983 (2007) ("Under *Smith* ... the free exercise clause should not shield religious practices from Title VII); *id.* at 1984 (criticizing attempts made by courts and commentators to distinguish *Smith* in the ministerial exception context); *but see* Kathleen Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. REV. 1633, 1649-56, 1672-79 (2004).

<sup>14</sup> See Corbin, *Above the Law*, *supra* note \_\_, at 2003.

<sup>15</sup> *Id.* See also Cass R. Sunstein, *On the Tension between Sex Equality and Religious Freedom* (2007), available at SSRN: [http://ssrn.com/abstract\\_id=995325](http://ssrn.com/abstract_id=995325); Sarah Fulton, Note, *Petruska v. Gannon University: A Crack in the Stained Glass Ceiling*, 14 WM. & MARY J. WOMEN & L. 197 (2007); Lauren P. Heller, Note, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN'S L. REV. 663 (2007); *cf.* Joshua Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005 (2007).

<sup>16</sup> Corbin, *Above the Law*, *supra* note \_\_, at 2003.

<sup>17</sup> 460 F.2d 553 (5<sup>th</sup> Cir. 1972).

exception.<sup>18</sup> In order for the exception to apply, the employer must be a religious institution and the employee must function as a minister.<sup>19</sup> The employer need not, however, be a church, diocese or synagogue, or an entity operated by such a religious organization. Instead, a religious employer is any entity “whose mission is marked by clear or obvious religious characteristics.”<sup>20</sup> Thus, religiously affiliated schools and hospitals are religious employers for purposes of the ministerial exception.<sup>21</sup> In addition, the category of ministerial employee is not limited to those who are ordained ministers. Instead, ministerial status is determined by considering the employee’s function within the religious institution. The ministerial exception applies if “the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision of religious ritual and worship.”<sup>22</sup> The exception has been applied to bar claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, as well as state common law claims.<sup>23</sup>

While many courts have recognized and applied the ministerial exception, they have adopted a range of positions regarding the constitutional foundation for the doctrine. Prior to *Smith*, the exception was often thought to be rooted in the Free Exercise

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<sup>18</sup> Corbin, *Above the Law*, *supra* note \_\_\_, at 1966

<sup>19</sup> Hollins, 474 F.3d at 225.

<sup>20</sup> Hollins, 474 F.3d at 226 (quoting *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 310 (4<sup>th</sup> Cir. 2004) (holding that a predominantly Jewish nursing home is a religious employer that can invoke the ministerial exception)).

<sup>21</sup> 474 F.3d. at 225.

<sup>22</sup> 474 F.3d. at 226 (quoting *Rayburn*, 772 F.2d at 1169); *see* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979) (articulating the functional understanding of ministerial employees).

<sup>23</sup> Hollins, 474 F.3d at 225 (citing cases).



Clause.<sup>24</sup> Many courts continue to adopt a free exercise rationale, even though the reasoning of *Smith* would seem to undermine that approach.<sup>25</sup> Other courts and commentators see the exception as rooted in a right to church autonomy that is protected by the Establishment Clause, or in some combination of the First Amendment's two religion clauses.<sup>26</sup> Some level of constitutional protection for ministerial employment decisions might also be rooted in the Court's precedents recognizing a First Amendment right of expressive association.<sup>27</sup>

To what extent might a doctrine like the ministerial exception provide a constitutional foundation for the freedom of the church to be the church? Some scholars, including the Jesuit theologian John Courtney Murray, have suggested that protection for the freedom of the church was "codified" in the First Amendment.<sup>28</sup> Murray argued that the Religion Clauses of the First Amendment "sufficiently achieved" the important objective of guaranteeing the Church "a full independence in the fulfillment of her divine mission."<sup>29</sup> Others, including Professor Richard Garnett, are "not so sure."<sup>30</sup> Garnett

<sup>24</sup> See, e.g., *Rayburn*, 772 F.2d at 1168-69; see also Corbin, *supra* note \_\_, at 1977-79; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1396 (1981).

<sup>25</sup> See, e.g., *E.E.O.C. v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800-801 & 800 n.\* (4<sup>th</sup> Cir. 2000); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343, 347-50 (5<sup>th</sup> Cir. 1999); *E.E.O.C. v. Cath. Univ. of Am.*, 83 F.3d 455, 461-63, 467 (D.C. Cir. 1996); see also Brady, *The Surprising Lessons of Smith*, *supra* note \_\_, at 1649-56.

<sup>26</sup> See, e.g., Corbin, *supra* note \_\_, at 1979-80; Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 34 n. 162 (2005) (noting that the ministerial exception is "born of both Establishment and Free Exercise considerations"); See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 44, 49, 50 n. 201 (1998-99); cf. Schleicher, 2008 WL 516892, at \*2 (while "the ministers exception is a rule of interpretation, not a constitutional rule," it is derived from policies that "come from the establishment clause rather than from the free-exercise clause").

<sup>27</sup> See Corbin, *supra* note \_\_, at 1981, 2028-38; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 St. John's J. Legal Comment. 515, 517, 522, 528-30 (2007); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 23 & n. 145 (2007), available at SSRN: <http://ssrn.com/abstract=916336>.

<sup>28</sup> Garnett, *The Freedom of the Church*, *supra* note \_\_, at 4. See JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 69-71 (1960).

<sup>29</sup> MURRAY, *WE HOLD THESE TRUTHS*, *supra* note \_\_, at 70.

questions whether “there actually, is, in American constitutional law, a commitment to – or even room for” – a rich understanding of the freedom of the church.<sup>31</sup> While there are a variety of constitutional doctrines, including the ministerial exception, that have the effect of protecting various dimensions of institutional religious freedom, Garnett suggests that constitutional doctrines like the ministerial exception “do not, in fact, evidence a robust, underlying commitment in our law to the *libertas ecclesiae* principle.”<sup>32</sup>

Even the ministerial exception may be difficult to square with the Court’s recent religion clause jurisprudence. While some form of the ministerial exception might well be grounded in the Court’s expressive association precedents,<sup>33</sup> the right of expressive association can be overcome by a compelling governmental interest.<sup>34</sup> Given the anemic fashion in which courts often engage in compelling interest analysis when faced with a claim of religious freedom,<sup>35</sup> freedom of expressive association may not end up providing robust protection to the freedom of the church, even when the church invokes religious doctrine in support of its ministerial selection criteria. In the face of this doctrinal indeterminacy, Garnett asks a provocative question: does the *libertas ecclesiae* principle survive in the First Amendment, as Murray argued, and did it ever do “any real work, in Religion Clause theory and doctrine?”<sup>36</sup> Garnett’s question prompts another, equally provocative, question: To what extent is it even possible to talk successfully

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<sup>30</sup> Garnett, *Freedom of the Church*, *supra* note \_\_, at 4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 5; *see also id.* at 13 (questioning whether the constitutionally protected religious liberty of believers expressing their beliefs in and through communities “is the same thing, and up to the same ‘revolutionary’ task,” as Murray “meant by the freedom of the Church”).

<sup>33</sup> *See* note 31 *supra* (citing Corbin and Garnett).

<sup>34</sup> Corbin, *supra* note \_\_, at 2032-38.

<sup>35</sup> *See, e.g.,* Catholic Charities, 85 P.3d at 91- (California contraceptive coverage mandate statute passes strict scrutiny under the free exercise clause of the California Constitution).

<sup>36</sup> Garnett, *Freedom of the Church*, *supra* note \_\_, at 13.

about a theological principle like “the freedom of the church” in the language of the law?<sup>37</sup>

This Article endeavors to explore these questions by examining the ministerial exception to antidiscrimination law as a case study of the extent to which the U.S. Constitution adequately protects the freedom of the church. The focus of this exploration will be the question of the nature of the defense provided by the ministerial exception: should the ministerial exception be characterized as a subject matter jurisdiction defense, or as a challenge to the legal sufficiency of the plaintiff’s claim? And how is the answer to this procedural question related to the idea of the freedom of the church?

Part I will briefly describe the confusion that currently exists regarding the nature of the defense provided by the ministerial exception. Part II will discuss the theological principle of the freedom of the church, and argue that a proper understanding of this principle includes a jurisdictional distinction between church and state. Part III will outline Prof. Carl Esbeck’s theory of the structural establishment clause, and suggest that his understanding of the establishment clause has important points of contact with Murray’s understanding of the jurisdictional implications of the freedom of the church. Esbeck’s structural understanding of the establishment clause demonstrates that the principle of the freedom of the church is not an idea entirely foreign to the U.S. Constitution. Part IV will then explain why the ministerial exception is best understood as a subject matter jurisdiction defense. Getting the right answer to this civil procedure question is not just a matter of citing the right procedural rule in the defendant’s motion to dismiss; rather careful attention to this question will lead to a better understanding of

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<sup>37</sup> Cf. James Boyd White, *Talking About Religion in the Language of the Law: Impossible But Necessary*, 81 MARQUETTE L. REV. 177 (1998).

the foundations of our constitutional order. When courts clearly and consistently treat the ministerial exception as a limitation on the subject matter jurisdiction of the civil courts, they make a powerful statement about the foundations of limited government: Such statements affirm the penultimacy of the state. Yet, even though it provides crucial protection for a dimension of institutional religious freedom, the jurisdictional approach alone cannot provide an adequate constitutional foundation for robust protection of the freedom of the church.

### I. *PETRUSKA'S MISTAKE*

In *Petruska v. Gannon University*<sup>38</sup> the Third Circuit wrongly concluded that the ministerial exception defense should be characterized as a challenge to the legal sufficiency of the plaintiffs claim. Lynnette Petruska, a former University Chaplain at Gannon University, filed an employment discrimination action in federal court against Gannon, a private Catholic diocesan college. Her claim alleged that she had been demoted as the result of a restructuring of the University Chaplain's office, and that this action had been taken by the University on the basis of her gender.

The university responded to her lawsuit by invoking the ministerial exception and filing a motion to dismiss her claim for lack of subject matter jurisdiction, or in the alternative, for failure to state a claim on which relief could be granted. The district court granted the university's motion to dismiss for lack of jurisdiction, and Petruska appealed. While the Third Circuit agreed that the ministerial exception required the district court to dismiss Petruska's sex discrimination action, the court did not believe that the ministerial exception should be understood as a jurisdictional bar. Instead, the court noted that the

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<sup>38</sup> 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

ministerial exception is properly raised in a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>39</sup>

The *Petruska* court maintained that the ministerial exception should not be considered a matter of subject matter jurisdiction, because, in its view, the exception does not take away a federal court's very power to hear this sort of case. The court explained that "it is beyond cavil that a federal district court has the authority to review claims arising under federal law,"<sup>40</sup> and *Petruska* had asserted a sex discrimination claim arising under Title VII of the Civil Rights Act of 1964. Because the claim arose under a federal statute, the district court had subject matter jurisdiction over the case.

Rather than seeing the exception as a constitutionally mandated limit on the subject matter jurisdiction of civil courts, the *Petruska* court drew on precedent from the Ninth and Tenth Circuits in support of its conclusion that the ministerial exception is best characterized as a challenge to the legal sufficiency of the plaintiff's claim.<sup>41</sup> While a federal court does have subject matter jurisdiction to hear this sort of claim arising under a federal employment discrimination statute, the First Amendment bars a court from granting relief to a ministerial employee asserting such a claim. In this respect, the court explained, the ministerial exception is like a government official's defense of qualified

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<sup>39</sup> 462 F.3d at 302.

<sup>40</sup> 439 F.3d at 302. *See also* *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9<sup>th</sup> Cir. 2004) ("Federal question jurisdiction is statutorily established, giving district courts 'original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331.") (holding that the ministerial exception should not be understood as a matter of subject matter jurisdiction); *cf.* *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 951 (9<sup>th</sup> Cir. 1999) ("[a]ny non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits"); *see also* *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners might actually recover. . . . [T]he failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

<sup>41</sup> 439 F.3d at 302 (citing *Elvig*, 375 F.3d at 955 and *Bryce v. Episcopal Church of the Diocese of Colorado*, 289 F.3d 648, 654 (10<sup>th</sup> Cir. 2002

immunity.<sup>42</sup> The court noted that defendants often raise the issue of qualified immunity in a Rule 12(b)(6) motion to dismiss for failure to state a claim; it is not a matter of subject matter jurisdiction. As in the case of qualified immunity, the ministerial “exception may serve as a barrier to the success of a plaintiff’s claims, but it does not affect the court’s authority to consider them.”<sup>43</sup>

While the Third, Ninth, and Tenth Circuits<sup>44</sup> view the ministerial exception as a challenge to the legal sufficiency of the plaintiff’s claim, other courts characterize it as a subject matter jurisdiction bar. As the Sixth Circuit recently explained,

[t]he ministerial exception, a doctrine rooted in the First Amendment’s guarantees of religious freedom, precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution’s constitutional right to be free from judicial interference in the selection of those employees.<sup>45</sup>

Thus, to raise the ministerial exception as a defense to an employment discrimination claim is to challenge the court’s very power to hear and decide a ministerial employee’s claim against a religious institution.<sup>46</sup> A large number of courts share this jurisdictional understanding of the ministerial exception.<sup>47</sup> As the Seventh Circuit noted in another

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<sup>42</sup> 462 F.3d at 302 (citing *Bryce v. Episcopal Church of the Diocese of Colorado*, 289 F.3d 648, 654 (10<sup>th</sup> Cir. 2002) (“If the church autonomy doctrine applies to the statements and materials on which plaintiffs have based their claims, then the plaintiffs have no claim for which relief may be granted. In this sense, the assertion that the First Amendment precludes the sexual harassment suit is similar to a government official’s defense of qualified immunity . . . .”)).

<sup>43</sup> 462 F.3d at 303.

<sup>44</sup> The Tenth Circuit in *Bryce* was considering the related “church autonomy doctrine,” rather than the ministerial exception itself. See *Petruska*, 462 F.3d at 302.

<sup>45</sup> *Hollins v. Methodist Health Care, Inc.*, 474 F.3d 223, 225 (6<sup>th</sup> Cir. 2007).

<sup>46</sup> See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42-43 (1998-99) (noting that a jurisdictional dismissal “is a concession that the issue in dispute . . . is not within the court’s constitutional power” to decide; “Jurisdiction, of course, concerns the scope of a court’s power as defined by the Constitution.”).

<sup>47</sup> See, e.g., *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7<sup>th</sup> Cir.), *cert. denied*, 127 S. Ct. 190 (2006); *E.E.O.C. v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4<sup>th</sup> Cir. 2000); *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 345 (5<sup>th</sup> Cir. 1999); *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (rejecting

recent ministerial exception case, secular courts have no power to speak – *i.e.*, no jurisdiction – with respect to the issues surrounding a religious body’s choice of ministerial employees.<sup>48</sup>

## II. JURISDICTION AND THE FREEDOM OF THE CHURCH

John Courtney Murray was confident that the important objective of safeguarding the freedom of the church was “sufficiently achieved by the religious provisions of the First Amendment.”<sup>49</sup> Murray argued that a jurisdictional “distinction between church and state”<sup>50</sup> was affirmed by the Constitution, and this distinction was adequate to protect the freedom of the church:

This affirmation is made through the imposition of limits on government, which is confined to its own proper ends, those of temporal society. ... [T]he American Constitution does not presume to define the Church or in any way to supervise her exercise of authority in pursuit of her own distinct ends. The Church is entirely

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minister’s assertion “that lay courts have jurisdiction to hear his age discrimination claims”); *Patsakis v. Greek Orthodox Archdiocese of America*, 339 F. Supp. 2d 689, 692-93 (W.D. Pa. 2004) (“The propriety of asserting the ‘ministerial exception’ defense through a 12(b)(1) motion . . . is well-established.”); *Musante v. Notre Dame of Easton Church*, 2004 WL 721774, \*5 (D. Conn. 2004) (“When the ministerial exception applies, courts lack subject matter jurisdiction over the case.”); *Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669, 674 (DC 2005) (“Our own decisions most analogous to this case teach that the Archdiocese’s motion to dismiss on First Amendment grounds is properly analyzed as a challenge to subject matter jurisdiction under [Rule] 12(b)(1).”); *Van Osdol v. Vogt*, 908 P.2d 1122, 1134 (Col. 1996) (ministerial exception precludes court “from taking jurisdiction” over the claims); *Rweyemamu v. Commission on Human Rights and Opportunities*, 2006 WL 3511771, \*3 (Conn. App. 2006) (“It bears emphasis that the ministerial exception is jurisdictional rather than evidentiary. Religious institutions need not rely on proof of affirmative defenses in employment discrimination suits but may categorically resist the judicial intrusion implicit in inquiry into their employment practices and relationships.”); *Malichi v. Archdiocese of Miami*, 2006 WL 3207982, \*1 (Fla. App. 1 Dist. 2006) (“[C]ivil courts lack subject-matter jurisdiction . . . to consider Appellant’s claim because it constitutes an internal employment dispute between a priest and his church.”); Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 34 n.162 (2005) (the limitations of the ministerial exception “go to subject-matter jurisdiction of the civil courts”); Esbeck, *The Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 49 & 50 n. 201; *see also* *Dolquist v. Heartland Presbytery*, 342 F. Supp.2d 996, 998-99 (D. Kan. 2004) (noting that some courts have characterized the ministerial exception as jurisdictional, while others have held that it is more appropriately characterized as a challenge to the sufficiency of the plaintiff’s claim under Rule 12(b)(6); *cf.* *Schleicher*, 2008 WL 516892, at \*5 (characterizing the doctrine as a merits defense that should be raised in a Rule 12(c) motion for judgment on the pleadings).

<sup>48</sup> *Tomic*, 442 F.3d at 1037.

<sup>49</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note \_\_, at 70.

<sup>50</sup> *Id.*; *see also id.* at 65 (noting that the “distinction between the spiritual and temporal orders and their respective jurisdictions” was a “key principle” for Roger Williams).

free to define herself and to exercise to the full her spiritual jurisdiction. It is legally recognized that there is an area which lies outside the competence of government. This area coincides with the area of the divine mission of the Church, and within this area the Church is fully independent, immune from interference by political authority.<sup>51</sup>

Murray concluded that “[i]n the United States the freedom of the Church was completely unfettered; she could organize herself with the full independence which is her native right.”<sup>52</sup>

What is the extent of the area of “spiritual jurisdiction” that lies beyond the interference of political authority? The Second Vatican Council’s *Declaration on Religious Freedom*, a document on which Murray’s thought exercised significant influence,<sup>53</sup> characterized the theological principle of the freedom of the church in this way: the “freedom of the Church is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order.”<sup>54</sup> The Church claims for herself that “full measure of freedom which her care for the salvation of men requires,” and she bases that claim “in her character as a spiritual authority, established by Christ the Lord,” and given by divine mandate “the duty of going out into the whole world and preaching the gospel to every creature.”<sup>55</sup>

The Declaration on Religious Freedom also articulates an alternative rationale for the principle of the freedom of the Church that is *not* rooted in the unique mandate given by Christ to his Church: the Church “also claims freedom for herself in her character as a society of men who have the right to live in society in accordance with the precepts of the

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<sup>51</sup> *Id.* at 70.

<sup>52</sup> *Id.* at 71.

<sup>53</sup> See Leslie Griffin, *Commentary on on Dignitatis humanae (Declaration on Religious Freedom) in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS* 249, 250-54, 257 (Kenneth R. Himes, O.F.M., ed. 2005).

<sup>54</sup> *Declaration on Religious Freedom*, #13, in *THE DOCUMENTS OF VATICAN II* 693 (Walter M. Abbot, S.J., ed. 1966).

<sup>55</sup> *Id.* at 694.



Christian faith.”<sup>56</sup> “Religious bodies are a requirement of the social nature both of man and of religion itself.”<sup>57</sup> Thus, the freedom from coercion in religious matters that flows from the dignity of the human person gives rise to a freedom from coercion when individuals act in community. Understood in this way, the freedom claimed by the Catholic Church is a freedom shared by *all* churches and religious communities, and the content or object of the right protected by the principle of the freedom of the church is the same for the Catholic Church and all other religious bodies.<sup>58</sup>

The content of the institutional freedom demanded by the principle of the freedom of the church is spelled out in article 4 of the Declaration on Religious Freedom. As the first words of the relevant text make clear, the principle of the freedom of the church does not demand an absolute freedom from any legal regulation:

*Provided the just requirements of public order are observed, religious bodies rightfully claim freedom in order that they may govern themselves according to their own norms, honor the Supreme Being in public worship, assist their members in the practice of the religious life, strengthen them by instruction, and promote institutions in which they may join together for the purpose of ordering their own lives in accordance with their religious principles.*<sup>59</sup>

The freedom of the church also gives rise to freedom from coercion in the areas of church life most directly relevant to the ministerial exception:

Religious bodies also have *the right not to be hindered, either by legal measures or by administrative action on the part of government, in the selection, training,*

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, #4, at 682.

<sup>58</sup> See John Courtney Murray, S.J., *Commentary and Notes on the Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II 682 n. 9 (Walter M. Abbot, S.J., ed. 1966). The foundation of the freedom claimed by the Catholic Church is the unique mandate of Christ. “In the case of other religious Communities, the foundation of the right is the dignity of the human person, which requires that men be kept free from coercion, when they act in community, gathered into Churches, as well as when they act alone.” *Id.*; see also *Declaration on Religious Freedom*, #13, *supra* note \_\_, at 694 (Because all people “possess the civil right not to be hindered in leading their lives in accordance with their conscience[,] a harmony exists between the freedom of the Church and the religious freedom which is to be recognized as the right of all men and communities and sanctioned by constitutional law.”).

<sup>59</sup> *Declaration on Religious Freedom*, #4, *supra* note \_\_, at 682 (emphasis added).

*appointment, and transferal of their own ministers, in communicating with religious authorities and communities abroad, in erecting buildings for religious purposes, and in the acquisition and use of suitable funds or properties.*<sup>60</sup>

The freedom of the church also protects the freedom of the church to speak in the public square, both in order to spread the faith and in order to influence public policy:

Religious bodies also have the right not to be hindered in their public teaching and witness to their faith, whether by the spoken or by the written word.... In addition, it comes with in the meaning of religious freedom that religious bodies should not be prohibited from freely undertaking to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity.<sup>61</sup>

As Murray notes, by affirming the right to bring the insights of faith to bear on the whole of human activity – including questions of public policy – the principle of the freedom of the church stands against any attempts to argue that religion is a purely private affair that must be kept confined to the sacristy. Instead, the Declaration insists that “[r]eligion is relevant to the life and action of society. Therefore religious freedom includes the right to point out this social relevance of religious belief.”<sup>62</sup> This aspect of the freedom of the church is indeed “a core religious function”; it is an “integral part of the practice of religion to speak to the moral and spiritual dimensions of social issues.”<sup>63</sup> The effective exercise of this aspect of the freedom of the church empowers the Church to be the Church by serving as a voice speaking out to protect the dignity and

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<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> *Id.*, at 682-83. The Declaration also explains that “the social nature of man and the very nature of religion afford the foundation of the right of men freely to hold meetings and to establish educational, cultural, charitable, and social organizations, under the impulse of their own religious sense.” *Id.*, at 683.

<sup>62</sup> Murray, *Commentary and Notes on the Declaration*, *supra* note \_\_, at 683 n. 11.

<sup>63</sup> Robert T. Kennedy, *Contributions of Dignitatis Humanae to Church-State Relations in the United States*, in RELIGIOUS LIBERTY: PAUL VI AND DIGNITATIS HUMANA 103 (John T. Ford, C.S.C., ed., 1995). See also Pastoral Constitution on the Church in the Modern World, #76, in THE DOCUMENTS OF VATICAN II 288-89 (Walter M. Abbot, S.J., ed. 1966) (“[I]t is always and everywhere legitimate for [the Church] to preach the faith with true freedom, to teach her social doctrine, and to discharge her duty among men without hindrance.”).

transcendence of the human person in the face of state efforts to assert omniscient omnicompetence over all areas of human life and human activity.<sup>64</sup>

The Declaration confidently asserts that where these components of the principle of the freedom of the church are taken seriously in law and in practical application, “there the Church succeeds in achieving a stable situation of right as well as of fact and the independence which is necessary for the fulfillment of her divine mission. This independence is precisely what the authorities of the Church claim in society.”<sup>65</sup> Taken as a whole, the Declaration on Religious Freedom teaches that the freedom of the Church – the independence necessary for the fulfillment of the Church’s divine mission – is not an absolute freedom. Instead, it is an assertion of internal institutional autonomy and freedom from arbitrary regulation.<sup>66</sup> As article 4 of the Declaration makes clear, the just demands of public order (the promotion of justice, peace, and public morality) may give rise to reasonable regulation of the activity of the Church in the temporal sphere without violating the principle of the freedom of the Church.<sup>67</sup>

That assertion, of course, begs a critical question: who is to determine when regulation of the activity of the Church is a reasonable response to the just demands of public order, and how is that determination to be made? In other words, “when, and to what extent, may civil government place restrictions upon the exercise of religious

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<sup>64</sup> See MURRAY, WE HOLD THESE TRUTHS, *supra* note \_\_, at 68 (the American understanding of separation of church and state rejects “the juridical omnipotence and omnicompetence of the state”).

<sup>65</sup> *Declaration on Religious Freedom*, #13, *supra* note \_\_, at 694.

<sup>66</sup> Kennedy, *Contributions of Dignitatis Humanae*, *supra* note \_\_, at 96, 97 (Church and state “[e]ach must enjoy internal autonomy; each must respect the freedom of the other to fulfill its function in service to the larger society of which it is a part; neither may assume the role and responsibilities of the other.”).

<sup>67</sup> *Id.* at 96 (the independence ‘necessary for the fulfillment of the Church’s divine mission,’ is “not an absolute independence denying all regulatory authority in civil government”). The components of public order – justice, peace, and public morality – are outlined in #7 of the Declaration. See *Declaration on Religious Freedom*, *supra* note \_\_, at 685-87; see also Gregory A. Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 14-30 (2006) (discussing the role played by the concept of public order in the Declaration)

freedom?”<sup>68</sup> Current U.S. constitutional doctrine provides a distressingly expansive answer to this question. The Court in *Employment Division v. Smith*, held that the free exercise clause provides no protection for religious freedom when a neutral law of general application incidentally imposes a burden on religiously motivated activity – no matter how significant that burden might be, and no matter how insignificant a threat to the government’s interest in promoting public order might be posed by judicial recognition of an exception to the regulation.<sup>69</sup>

The Declaration on Religious Freedom did provide some specificity regarding the elements of the public order component of the common good: the state acts properly through law when its objective is to promote justice, public peace, and public morality. The Declaration did not, however, specify what sort of legal framework ought to be employed in order to determine when the demands of public order justify placing a particular restriction on the exercise of religious freedom, nor did it take a position on what institution – the judiciary or the legislature – should have the primary role in determining whether a particular restriction is reasonable in light of the demands of public order. As John Courtney Murray himself recognized, “the criterion of public order remains general, in need of further specification, *and subject to abuse*.”<sup>70</sup> The *Smith* rule seems to enhance dramatically the possibility that the public order criterion will be abused by legislatures insensitive to the demands of religious freedom or opposed to the

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<sup>68</sup> Kennedy, *Contributions of Dignitatis Humanae*, *supra* note \_\_, at 107. John Courtney Murray saw this question as the “‘crucial issue’ in the care of religion by government.” *Id.* (citing John Courtney Murray, S.J., *The Problem of Religious Freedom*, 25 THEOLOGICAL STUD. 519, 527, 528 (1964)).

<sup>69</sup> See *Employment Division v. Smith*, 494 U.S. 872 (1990); Garnett, *Freedom of the Church*, *supra* note \_\_, at 16.

<sup>70</sup> Kennedy, *Contributions of Dignitatis Humanae*, *supra* note \_\_, at 108 (emphasis added).

sort of challenge that the robust recognition of the freedom of the Church presents to the ideology of state monism.

Acknowledging the potential for abuse of the public order criterion, Murray argued that the state through law could restrict “religious expression (in public rites, teaching, observance, or behavior) *only* when such forms of public expression *seriously* violate either the public peace or commonly accepted standards of public morality, or the rights of other citizens.”<sup>71</sup> Murray recognized that a practical problem arises in trying to apply this general principle to particular cases – how to avoid arbitrary application of the public order principle by the public power? Murray responded to this problem by outlining four fundamental requirements that should be adhered to in the casuistry that necessarily develops as the principle is applied in practice:

that the violation of the public order be really serious; that legal or police intervention be really necessary; that regard be had for the privileged character of religious freedom, which is not simply to be equated with other civil rights; and the rule of jurisprudence of the free society be strictly observed, scil., as much freedom as possible, as much coercion as necessary.<sup>72</sup>

The *Smith* rule takes none of these requirements into account. In contrast, Robert T. Kennedy argues that “Murray’s four requirements come close to expressing the essence of a legal doctrine used for many years by American courts [prior to *Smith*] to assess the constitutionality of legislation” that substantially burdened the free exercise of

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<sup>71</sup> John Courtney Murray, S.J., *The Problem of Religious Freedom*, 25 THEOLOGICAL STUD., 519, 530 (1964) (emphasis added).

<sup>72</sup> *Id.* Murray further explained that the issues of casuistry “will call for a continual dialogue between the public powers and the personal and political consciousness of the citizenry, with a view to finding equitable solutions. . . . What chiefly matters is that free exercise of religion should always be responsible. . . . What further matters is the spirit of tolerance, as a moral attitude, among the citizenry – a spirit of reverence and respect for others, which issues in an abhorrence of coercion in religious matters.” *Id.* If this moral attitude of tolerance is weak among the citizenry, and especially if this attitude is weak among their legislative representatives, the *Smith* rule seriously erodes robust constitutional protection for religious freedom.

religion.<sup>73</sup> Under the compelling interest test articulated by the Court in *Sherbert v. Verner*,<sup>74</sup> the government was prohibited from burdening religious exercise “unless the government is able to demonstrate that the restriction is necessary to further a paramount or compelling governmental interest and is the least restrictive means of doing so.”<sup>75</sup> Kennedy contends that this pre-*Smith* constitutional rule of strict scrutiny of laws that burden religious freedom was “entirely consistent” with the teaching of the Declaration, presumably including its teaching on the freedom of the Church.<sup>76</sup> Prior to *Smith*, then, it might not have been so hard to identify within the Free Exercise clause of the First Amendment adequate constitutional protection for the freedom of the Church. After *Smith*, greater attention must be paid to other constitutional foundations for that freedom. It may be time to take more seriously the dimension of the principle of the freedom of the church that finds expression in the jurisdictional distinction between church and state.

The principle of the freedom of the church finds its origins in a jurisdictional conflict. The eleventh century papal call for “the freedom of the church” was a call for “the liberation of the clergy from imperial, royal, and feudal domination and their unification under papal authority.”<sup>77</sup> Thus, the cry for the “freedom of the church” was a

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<sup>73</sup> Kennedy, *Contributions of Dignitatis Humanae*, *supra* note \_\_\_, at 108.

<sup>74</sup> 374 U.S. 398, 403 (1963).

<sup>75</sup> Kennedy, *Contributions of Dignitatis Humanae*, *supra* note \_\_\_, at 108.

<sup>76</sup> *Id.* at 110. Thus, Kennedy concludes the teaching of the Declaration on Religious Freedom “calls to the American legal system to return to one of the more resplendent of its constitutional features.” *Id.* But see *Smith*, 494 U.S. at 883 (noting that, outside the *Sherbert* context of the denial of unemployment compensation, the Court “has always found the [*Sherbert*] test satisfied”).

<sup>77</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 103-04 (1983). The “principal aim of the papal revolution” was “expressed in the slogan, ‘the freedom of the church.’” *Id.* at 105. Berman notes that the freedom of the church “was not something that could be achieved overnight – indeed, in its deepest significance it was not something that could be achieved ever – yet the very depth of the idea, its combination of great simplicity and great complexity, was a guarantee that the struggle to achieve it would be, on the one hand, a prolonged one, over decades and generations and even centuries, and on the other hand, a cataclysmic one, with drastic and often violent changes occurring in rapid succession.” *Id.*

cry for “its freedom from control by ‘the laity.’”<sup>78</sup> The plurality of jurisdictions and legal systems coexisting and competing within one community that Harold Berman argues is “[p]erhaps the most distinctive characteristic of the Western legal tradition” was itself the product of the church’s medieval insistence on its institutional freedom from lay, imperial domination: “The church declared its freedom from secular control, its exclusive jurisdiction in some matters, and its concurrent jurisdiction other matters. ... The very complexity of a legal order containing diverse legal systems contributed to legal sophistication.”<sup>79</sup>

Murray characterized the dual jurisdiction flowing from the “ancient distinction between church and state” – “[t]he dualism of mankind’s two hierarchically ordered forms of social life” – as “Christianity’s cardinal contribution to the Western political tradition.”<sup>80</sup> And Murray understood the limitations on governmental power articulated in the First Amendment as the constitutional vehicle that brought this strand of the Western political tradition into the American constitutional order. As Murray explained:

The juridical result of the American limitation on governmental powers is the guarantee to the Church of a stable condition of freedom.... It should be added that this guarantee is not only to the individual ... but to the Church as an organized society *with its own law and jurisdiction* ... Within society, as distinct from the state, there is room for the independent exercise of authority that is not that of the state.<sup>81</sup>

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<sup>78</sup> *Id.* at 108. Berman argues that it was out of this controversy that “the first Western theories of the state and of secular law ... were born.” *Id.* at 111.

<sup>79</sup> *Id.* at 10.

<sup>80</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note \_\_, at 64.

<sup>81</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note \_\_, at 78-79 (emphasis added), *quoted in* Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 55 n. 228. Murray notes that the U.S. Supreme Court affirmed this principle of Church freedom in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). The *Kedroff* case is discussed at note \_\_, *infra*. See also Gregory A. Kalscheur, S.J., *John Paul II, John Courtney Murray, and Relationship between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J. CATH. SOC. THOUGHT 231, 245-48, 265-66 (2004) (discussing the distinction between state and society as a central feature of Catholic social thought).

An incident from the early history of the American republic recounted by Leo Pfeffer in his book, *Church, State and Freedom*, indicates that the founders themselves understood the jurisdictional separation that is part of the “ancient distinction between church and state” and recognized the limits of civil authority with respect to the preexisting, organized society that is the church:

In 1783 the papal nuncio at Paris addressed a note to Benjamin Franklin suggesting that, since it was no longer possible to maintain the previous status whereunder American Catholics were subject to the Vicar Apostolic in London, the Holy See proposed to Congress that a Catholic bishopric be established in one of the American cities. Franklin transmitted the note to the [Continental] Congress, which directed Franklin to notify the nuncio that ‘the subject of his application to Doctor Franklin being purely spiritual, it is without the jurisdiction and powers of Congress, who have no authority to permit or refuse it, these powers being reserved to the several states individually.’ (Not many years later the several states would likewise declare themselves to ‘have no authority to permit or refuse’ such a purely spiritual exercise of ecclesiastical jurisdiction.)<sup>82</sup>

Commenting on this incidence, Murray noted that it had been “centuries [since] the Holy See [had] been free to erect a bishopric and appoint a bishop without the prior consent of government [and] all the legal formalities with which Catholic states had fettered the freedom of the Church.” This led Murray to conclude that, “[i]n the United States, the freedom of the Church was completely unfettered; she could organize herself with the full independence which is her native right.”<sup>83</sup> For Murray, jurisdictional independence was evidence of the “stability of the Church’s condition at law” that is “the root of the matter” of the freedom of the church.<sup>84</sup> The ancient recognition of a sphere of jurisdiction reserved to the church that is beyond the authority of civil government finds

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<sup>82</sup> LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 121 (1953), *quoted in* MURRAY, *WE HOLD THESE TRUTHS*, *supra* note \_\_, at 71. *See also* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385 (describing the disestablishment process in the states).

<sup>83</sup> MURRAY, *WE HOLD THESE TRUTHS*, *supra* note \_\_, at 71.

<sup>84</sup> *Id.*



its American constitutional analog in what Professor Carl Esbeck describes as the jurisdictional nature of the structural Establishment Clause. The structural Establishment Clause protects a reserved sphere in which the freedom of the church is secure; a sphere “in which religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission.”<sup>85</sup>

### III. JURISDICTION AND THE STRUCTURAL ESTABLISHMENT CLAUSE

Rather than trying to demonstrate why *Smith* does not eliminate a free exercise foundation for the ministerial exception, commentators like Carl Esbeck, Ira Lupu, and Robert Tuttle argue that the ministerial exception is best understood as a jurisdictional bar rooted in the establishment clause. Esbeck, for example, maintains that the line of Supreme Court precedent that gives rise to the ministerial exception “is more easily understood when the Establishment Clause is conceptualized as a structural restraint on government’s power to act on certain matters pertaining to religion.”<sup>86</sup> The Establishment Clause as a structural principle operates by policing a jurisdictional boundary. Indeed, the structural Establishment Clause is a “model of dual jurisdictions”<sup>87</sup> – the clause separates “two spheres of competence,”<sup>88</sup> government and religion, and orders the relationship that exists between those two spheres. Some matters fall within the competence of civil government, others remain in the exclusive sphere of religion, and others might be shared by religion and government.<sup>89</sup>

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<sup>85</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 55-56. See also notes 51-54 *supra* & accompanying text (discussing the Catholic Church’s understanding of its divine origin and mission and the general issue of the freedom of religious institutions).

<sup>86</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 3-4.

<sup>87</sup> *Id.* at 28.

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.* at 14, 31.

Understood in this way, the structural Establishment Clause serves as a powerful witness to a fundamental commitment of American constitutionalism: the government is as an entity of limited authority. Esbeck draws on the work of William Clancy and Max L. Stackhouse to illustrate this point. Clancy, for example, explains that the logical distinction between government and religion as two separate orders of competence shows that “Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God’s. (Surely this is one of history’s more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.”<sup>90</sup>

Max Stackhouse sees the distinction between government and religion that is recognized in the Establishment Clause as governmental recognition of religion as a sort of co-equal, competing sovereign, outside the state’s control with respect to religious matters:

[The First] Amendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself .... However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, *religion is an area that, when it is doing its own thing, is off limits*. This is not only an affirmation of the freedom of individual belief or practice, not only an acknowledgement that the state is noncompetent when it comes to theology, *it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that least one association may be brought into being in society that has a sovereignty beyond the control of government.*<sup>91</sup>

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<sup>90</sup> William Clancy, *Religion as a Source of Tension*, in RELIGION AND THE FREE SOCIETY 23, 27-28 (1958), quoted in Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 10 n. 34.

<sup>91</sup> Max L. Stackhouse, *Religion, Rights, and the Constitution*, in AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990), quoted in Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 10 n. 34 (emphasis added).

How to define the sovereign arena in which religion “is doing its own thing” may present us with significant challenges, but the fundamental point is clear. The structural Establishment Clause affirms limited government by recognizing that some matters lie within an exclusive sphere of religion that is off-limits to governmental regulation.

Like John Courtney Murray,<sup>92</sup> Esbeck notes that this sort of jurisdictional division of authority has deep roots in the Western jurisprudential tradition. Esbeck, for example, quotes Roscoe Pound’s description of the jurisdictional division that prevailed in the Middle Ages: “In the politics and law of the Middle Ages the distinction between the spiritual and temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of politically organized society, was fundamental.”<sup>93</sup> This sort of division of authority and jurisdiction reflects the conviction that the temporal power is “not the sole possessor of sovereignty.”<sup>94</sup> The freedom of the church within the religious realm is aptly described as a “sovereign authority.” Government and religion might be seen as “cosovereigns” in this sense: there is a territory beyond civil affairs that is “reserved to the churches.”<sup>95</sup> To characterize government and religion as cosovereigns is to recognize that the churches are not simply voluntary organizations that exist at the sufferance of the state. They are not simply “jural entities, and not mere creatures of the law deriving their existence from the state.

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<sup>92</sup> See text at notes \_\_ - \_\_, *supra*.

<sup>93</sup> Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 6 (1933), *quoted in* Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 50 n. 206; *see also* MURRAY, WE HOLD THESE TRUTHS, *supra* note \_\_, at 64 (noting that the “ancient distinction between church and state” – [t]he dualism of mankind’s two hierarchically ordered forms of social life” – “had been Christianity’s cardinal contribution to the Western political tradition”).

<sup>94</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 54 n. 225 (quoting Mark DeWolfe Howe, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 92-95 (1953))

<sup>95</sup> *Id.*

Rather, churches preexisted the state, are transnational, and would continue to exist if the state were suddenly dissolved or destroyed.”<sup>96</sup>

Acknowledging the churches as social actors possessing independent authority that is not that of the state places a powerful limit on the power of the state. Such an acknowledgment affirms that the state’s assertion of sovereignty is not absolute. The protection of the freedom of churches as “sovereigns” not created by the state points to the existence of another sovereignty (the only true sovereignty) – that of a God (or gods) – existing “beyond, before, and superior to the state.”<sup>97</sup> Esbeck explains that “theistic religions posit a Sovereignty that sits in judgment over the state, its ambitions to temporal power, and its pretensions of infallibility. It is for this reason that at crucial points in Western history the institutional church had a ‘pivotal role in guarding against political absolutism.’”<sup>98</sup>

As institutions that give public witness, each in their own way, to absolute Truths that transcend politics, the churches relativize politics. Religion has political implications simply by asserting that political truth does not encompass the totality of all that humans

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<sup>96</sup> *Id.* at 55.

<sup>97</sup> *Id.* at 67. Cf. Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 101, 135 (2006) (“after all, [God] is sovereign if anyone be”). Drawing on the work of Judge John T. Noonan, Brennan notes that the American commitment to constitutional protection for religious freedom can be understood as a recognition of God’s sovereignty: [I]t allows us human subjects to meet our infeasible duty to inform conscience and freely follow the will of the sovereign God.... We must resist the Court’s and others’ claims on behalf of false sovereigns, not because we ourselves are individual sovereigns, but because, with respect to seeking to instantiate the good, personal and common both, we operate under an obligation that is nothing short of sovereign. The natural law that gives birth to this right of ours to self-government is itself our intelligent participation as human subjects in the Eternal Law, the mind of the sovereign God sweetly disposing all things to their proper ends.

*Id.* at 142-43.

<sup>98</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 67 (quoting Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State*, 49 LA. L. REV. 1057, 1072 (1989)). See also MURRAY, *WE HOLD THESE TRUTHS*, *supra* note \_\_, at 204-05 (“[T]he freedom of the Church as the spiritual authority served as the limiting principle of the power of government.”); Garnett, *The Freedom of the Church*, *supra* note \_\_, at 20 (“[T]here are reasons to think that the *libertas ecclesiae* has mattered and does matter for the development and sustaining of constitutionally limited government.”).

can desire and know. By “relativizing the political,” religion “operates to expand that social space that is nongovernmental.”<sup>99</sup> Those matters that fall under the exclusive sovereignty of religion are beyond the jurisdiction of government.<sup>100</sup> The resulting social space “gives breathing room to individuals, families, neighborhoods, and other mediating groups.”<sup>101</sup> All this, Esbeck maintains, follows from a structural, jurisdictional understanding of the Establishment clause.

How does the structural Establishment Clause define the boundary between the sphere of government and that of religion? This, Esbeck notes, “resolves itself down to a question of jurisdiction,”<sup>102</sup> and he judges the conclusion of Max Stackhouse to be apt: when religion “is doing its own thing,” it is off limits.<sup>103</sup> The government exceeds its jurisdiction as limited by the Establishment Clause when it attempts to regulate matters “in the exclusive sphere of religion”<sup>104</sup> or matters that are “inherently religious.”<sup>105</sup> Esbeck points to several Supreme Court cases to illustrate what he means by these terms. In *Tony and Susan Alamo Foundation v. Secretary of Labor*,<sup>106</sup> for example, the Court held that application of the requirements of the Fair Labor Standards Act to the ordinary commercial activities of a religious organization did not violate the Religion Clauses of the First Amendment.<sup>107</sup> Because the Act’s requirements “apply only to commercial activities undertaken with a ‘business purpose,’” they have “no impact on [the religious organization’s] own evangelical activities or on individuals engaged in volunteer work

<sup>99</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_\_, at 68.

<sup>100</sup> *Id.* at 109.

<sup>101</sup> *Id.* at 68.

<sup>102</sup> Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 325 (2000).

<sup>103</sup> *Id.*

<sup>104</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_\_, at 78.

<sup>105</sup> *Id.* at 79.

<sup>106</sup> 471 U.S. 290 (1985).

<sup>107</sup> 471 U.S. at 305-06.

for other religious organizations.”<sup>108</sup> The recordkeeping requirements of the Act, like “such secular governmental activity” as fire inspections and building regulations, did not unconstitutionally intrude into religious affairs. Insofar as it seeks to regulate the wages of employees involved in the ordinary commercial activities of a religious entity, the FLSA is legislation operating within the civil government’s proper sphere of action; it does not invade the protected religious sphere.<sup>109</sup>

In contrast, when the government sponsors prayer in schools and religious displays in government buildings, it has improperly entered the realm of the exclusively religious. Thus, Esbeck suggests that cases like *Lee v. Weisman*,<sup>110</sup> where the Court held that inviting clergy to offer prayers at graduation ceremonies for public middle schools and high schools violated the Establishment Clause, and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,<sup>111</sup> where the Court held that a crèche displayed on the Grand Staircase of the county courthouse violated the Establishment Clause, can both be understood as “structural determinations that government exceeded its power by involving itself in a matter beyond its authority.”<sup>112</sup>

Deciding where to draw the line between the sphere of governmental competence and the sphere of religious competence where government is not sovereign has been a

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<sup>108</sup> 471 U.S. at 305.

<sup>109</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 79. Cf. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 593-94 (1979) (because of the unique mission-sensitive role played by teachers in a church-operated school, “serious First Amendment questions” would follow from the NLRB’s exercise of jurisdiction over teachers in such schools). The Court in *Catholic Bishop* avoided deciding the constitutional question by assuming, in the absence of clear intent to the contrary, the Congress intended to exempt church-operated schools from regulation under the NLRA. 440 U.S. at 504-07. Esbeck argues that under the structural Establishment Clause, the outcome would be the same, “but with ecclesiastical autonomy protected without any timidity in stating that such a result is required by the Establishment Clause.” Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 79.

<sup>110</sup> 505 U.S. 577 (1992).

<sup>111</sup> 492 U.S. 573 (1989).

<sup>112</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_, at 98 n. 421

contentious task for 2,000 years.<sup>113</sup> It would, Esbeck argues, “be naïve to suppose that there is an easy formula for determining ‘what is Caesar’s and what is God’s.’”<sup>114</sup> At the same time, however, Esbeck warns against exaggerating the difficulty involved in drawing the line.<sup>115</sup> Paying attention to what the Supreme Court has decided in its Establishment Clause cases “indicates that government does not exceed the restraints of the Establishment Clause unless it is acting on topics that are ‘inherently religious.’” Examples of such topics include prayer, devotional bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical narrative of creation taught as science. These topics are “off limits” as objects of purposeful governmental action. In contrast, subject matters that are not “inherently religious” are legitimate objects for governmental action, even when the governmental action reflects a moral judgment about the social good that might coincide with the theological judgment of some religions.

Governmental action that would “involve government in the ‘essentially religious activities’ of religious institutions” would cross the line into the sphere of the inherently religious.<sup>116</sup> In contrast, “where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State so significantly and directly in the realm of the sectarian,” then the government has not crossed the boundary into the exclusive realm of

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<sup>113</sup> See MURRAY, WE HOLD THESE TRUTHS, *supra* note \_\_\_, at 64 (“The distinction [between the spiritual and temporal orders] had always been difficult to maintain in practice, even when it was affirmed in theory.”).

<sup>114</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_\_, at 104-05.

<sup>115</sup> *Id.*

<sup>116</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_\_, at 108 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 658 (1971) (Brennan, J., concurring)).

religion.<sup>117</sup> Esbeck contends that “inherently religious” activities are “those exclusively religious activities of worship and the propagation or inculcation of the sort of tenets that comprise confessional statements or creeds common to many religions.”<sup>118</sup> The term “inherently religious” also embraces the supernatural claims of religious communities “around which religion (religare) identifies and defines itself, conducts its collective worship, divines and teaches doctrine, and propagates the faith to children and adult converts.” These matters fall under the exclusive sovereignty of religion; they are beyond the jurisdiction of government.<sup>119</sup>

The selection of ministers would seem to fall squarely within the sphere of exclusive religious sovereignty, and the ministerial exception seems, therefore to rest upon a firm constitutional foundation under Esbeck’s structural/jurisdictional theory of the Establishment Clause. The selection of ministers is an activity that implicates the supernatural claims of religious communities, claims around which a religion identifies and defines itself, conducts its worship, develops and teaches doctrine, and propagates the faith. In this sense, the selection of ministers is an inherently religious activity that falls within the exclusive competence of religion.

#### IV. THE MINISTERIAL EXCEPTION, SUBJECT MATTER JURISDICTION, AND THE FREEDOM OF THE CHURCH

The prevailing understanding of what the ministerial exception means and how it operates leads to the conclusion that the exception should be characterized as a subject matter jurisdiction defense, not as a challenge to the legal sufficiency of the plaintiff’s claim. Unlike the Third Circuit in *Petruska*, most courts do understand the ministerial

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<sup>117</sup> *Id.* (quoting *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring)).

<sup>118</sup> Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note \_\_\_, at 109.

<sup>119</sup> *Id.*



exception as a constitutionally mandated limitation on a court's power to hear a particular category of cases brought against religious employers.<sup>120</sup> Subject matter jurisdiction concerns "the courts' statutory or constitutional *power* to adjudicate [a] case,"<sup>121</sup> and the label "jurisdictional" properly applies to "prescriptions delineating the classes of cases ... falling within a court's adjudicatory power."<sup>122</sup> As a constitutional limitation which removes a class of cases from the courts' adjudicatory power, the ministerial exception is best understood as giving rise to a subject matter jurisdiction objection. In other words, the First Amendment denies courts the authority to adjudicate a particular type of legal controversy – claims that seek to impose secular standards on a religious institution's employment of its ministers.<sup>123</sup> Thus, civil courts lack subject matter jurisdiction over such claims.

#### A. *The Difference Between Subject Matter Jurisdiction and Failure to State a Claim*

The Third Circuit's confusion regarding the distinction between a subject matter jurisdiction defense and the defense of failure to state a claim is not unique. As the Supreme Court noted in a recent Title VII case, *Arbaugh v. Y & H Corporation*,<sup>124</sup> courts often confuse or conflate two concepts that must be distinguished: "federal-court subject-

<sup>120</sup> See note \_\_ *supra* (citing cases).

<sup>121</sup> *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); *id.* at 94 ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).

<sup>122</sup> *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); see also *Rweyemamu v. Commission on Human Rights and Opportunities*, 2006 WL 3511771, \*1 (Conn. App. 2006) ("Jurisdiction of the subject-matter is the power of [the court] to hear and determine cases of the general class to which the proceedings in question belong. ... A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy.") (quoting *Figueroa v. C & S Ball Bearing*, 675 A.2d 845, 847 (Conn. 1996)); *id.* at \*4 ("The ministerial exception prevents courts or government agencies from exercising jurisdiction over a religious institution's actions regarding the employment of its ministers.") .

<sup>123</sup> See *EEOC v. Catholic University of America*, 83 F.3d 455, 467 (DC Cir. 1996) (the ministerial exception is "judicial shorthand" for the conclusion that "the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion").

<sup>124</sup> 126 S. Ct. 1253 (2006).

matter jurisdiction over a controversy; and the essential elements of a federal claim for relief.”<sup>125</sup> The Court in *Arbaugh* held that the statutory employee-numerosity requirement for establishing employer status under Title VII was not a matter of subject matter jurisdiction. Instead, that numerosity requirement was an element of the plaintiff’s claim for relief, and thus was properly raised in a 12(b)(6) objection (which cannot be raised after trial), rather than as 12(b)(1) objection (which, pursuant to Rule 12(h)(3), can be raised at any time).<sup>126</sup>

The *Arbaugh* Court explained that, “[o]n the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. Subject-matter jurisdiction in federal cases is sometimes erroneously conflated with a plaintiff’s need and ability to prove the defendant bound by the federal law asserted as a predicate for relief – a merits-related determination.”<sup>127</sup> Because Title VII actions are civil actions arising under the laws of the United States, subject matter jurisdiction in the case before the Court in *Arbaugh* existed pursuant to 28 U.S.C. § 1331.<sup>128</sup> Subject matter jurisdiction “involves the court’s power to hear a case,”<sup>129</sup> and § 1331 gave the court the power to hear this Title VII case.<sup>130</sup> Whether Y & H Corporation employed enough people to be bound by the prohibitions of Title VII was a question of the merits, an element of the plaintiffs claim, not a matter of subject matter jurisdiction. If the employer does not employ the statutorily required number of employees, the employer is not bound to comply with Title VII and the plaintiff is not

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<sup>125</sup> 126 S. Ct., at 1238.

<sup>126</sup> *Id.*

<sup>127</sup> 126 S. Ct., at 1242.

<sup>128</sup> 126 S. Ct. at 1238.

<sup>129</sup> 126 S. Ct. at 1244.

<sup>130</sup> *Id.* (“A plaintiff properly invokes §1331 jurisdiction when she pleads a colorable claim arising under the Constitution or laws of the United States.”).

entitled to any relief under the statute. A court has the power to hear such a case, but it lacks power under the statute to provide the plaintiff with any relief, because the plaintiff is unable to establish one of the essential predicates for obtaining relief.

At first blush, the Court's analysis in *Arbaugh* would seem to validate the Third Circuit's approach to the ministerial exception defense in *Petruska*. The *Petruska* court reasoned that it had the power to hear Petruska's case, because she had raised a claim arising under federal law. The ministerial exception defense, in the court's view, did not go "the court's very power to hear the case."<sup>131</sup> Instead, the exception allows the defendant to argue that "the First Amendment bars Petruska's claims....The exception may serve as a barrier to the success of a plaintiff's claims, but it does not affect the court's authority to consider them."<sup>132</sup> Section 1331 allows the court to hear Petruska's claim, but the First Amendment bars the court from providing her with any relief under Title VII. Thus, the Third Circuit concluded, the ministerial exception gives rise to a 12(b)(6) objection, not a 12(b)(1) objection.

Yet the reason why the plaintiff's claim is barred in *Petruska* makes that case quite different from the case before the Court in *Arbaugh*. In *Arbaugh*, the question boiled down to this: is the plaintiff entitled to relief under the terms of the statute that the plaintiff has asserted as the predicate for relief? If the defendant employs the requisite number of employees, Title VII applies, and the plaintiff can state a claim for relief under the statute. In *Petruska*, in contrast, the plaintiff would seem to be able to state a claim establishing all the essential elements for relief under Title VII. As the Fourth Circuit

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<sup>131</sup> 462 F.3d at 302.

<sup>132</sup> 462 F.3d at 302-03.

explained in *Rayburn v. General Conference of Seventh-Day Adventists*,<sup>133</sup> while Title VII does allow religious organizations to take religion into account in hiring, the statute does not authorize religious organizations to make ministerial hiring decisions on the basis of race or sex.<sup>134</sup> Instead, both the text and history of the statute led the court “to conclude that, Title VII, by ‘the affirmative intention of the Congress clearly expressed,’ applies to [ministerial] employment decision[s].”<sup>135</sup> Moreover, the *Petruska* court explicitly referenced *Rayburn* in its discussion of the jurisdictional question: “We agree with the Fourth Circuit that Congress intended Title VII to apply to cases involving sexual discrimination and retaliation by religious institutions. We must therefore reach the constitutional question – i.e., whether application of Title VII to a ministerial employment relationship violates the First Amendment.”<sup>136</sup> This constitutional question, however, would seem to lead back to the issue of subject matter jurisdiction. The First Amendment bars relief in ministerial exception cases precisely because courts lack the “very power” to hear the employment discrimination cases brought by ministerial employees. Courts cannot hear and decide such cases without violating the First Amendment. In other words, the First Amendment removes such cases from the adjudicatory power of the courts.

B. *The Ministerial Exception as a Limitation on Adjudicatory Power*

A careful reading of the cases that provide the foundation for the ministerial exception reveals that the exception should be understood as a matter of subject matter jurisdiction. In the first case to recognize the ministerial exception, *McClure v. Salvation*

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<sup>133</sup> 772 F.2d 1164 (4<sup>th</sup> Cir. 1985).

<sup>134</sup> 772 F.2d at 1166.

<sup>135</sup> 772 F.2d at 1167 (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979)).

<sup>136</sup> 462 F.3d at 304 n.4.

*Army*,<sup>137</sup> the Fifth Circuit characterized the exception in jurisdictional terms.<sup>138</sup> Billie B. McClure brought a Title VII sex discrimination action against the Salvation Army, after the Salvation Army terminated her status as an officer. She alleged that she had received a lower salary and fewer benefits than similarly situated male officers and that she had been discharged because of her complaints about that adverse treatment to her superiors and to the Equal Employment Opportunity Commission.<sup>139</sup> Mrs. McClure conceded that the Salvation Army should be considered a religion and that, as an officer, she was a minister “engaged in the religious or ecclesiastical activities of the church.”<sup>140</sup> At the same time, she argued that the Salvation Army was not exempt from prohibition of sex discrimination in employment established by Title VII.<sup>141</sup>

Section 702 of Title VII does allow religious organizations to take religion into account when hiring employees to perform work connected to the organization’s religious activities.<sup>142</sup> The text of the statute does not, however, exempt religious employers from complying with its prohibitions of discrimination on the basis of race, color, sex, or national origin, and efforts to exempt religious organizations entirely from compliance with Title VII were rejected by Congress. Thus, the Fifth Circuit, explained, “[t]he language and legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating

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<sup>137</sup> 460 F.2d 553 (5<sup>th</sup> Cir. 1972).

<sup>138</sup> 460 F.2d at 560 (affirming the district court’s order “sustaining the Salvation Army’s motion to dismiss the complaint for want of jurisdiction”).

<sup>139</sup> 460 F.2d at 555.

<sup>140</sup> 460 F.2d at 556.

<sup>141</sup> 460 F.2d at 556.

<sup>142</sup> Section 702 of Title VII provides:

This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals *of a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1 (emphasis added).

against its employees on the basis of race, color, sex, or national origin with respect to their compensation, terms, conditions or privileges of employment.”<sup>143</sup>

Having reached this conclusion, the Fifth Circuit had to face this constitutional question: can Title VII be applied to the employment relationship between a church and its minister without violating the Religion Clauses of the First Amendment? The court began by explaining that, under then-prevailing Free Exercise doctrine, the government must establish a compelling interest in support of “state action which imposes even an ‘incidental burden’ on the free exercise of religion.” Indeed, “in this highly sensitive constitutional area [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”<sup>144</sup> The court then focused attention on the critical nature of the church-minister relationship that would be threatened by the application of Title VII in this case:

The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister’s salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.<sup>145</sup>

Characterizing the terms of employment between a church and its ministers as “a matter of church administration and government” allowed the Fifth Circuit to connect Mrs. McClure’s Title VII action to a series of Supreme Court precedents that had described the boundary between governmental authority and church authority in jurisdictional terms.

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<sup>143</sup> 460 F.2d at 558.

<sup>144</sup> 460 F.2d at 558 (quoting *Sherbert v. Verner*, 374 U.S. 398 (1963)).

<sup>145</sup> 460 F.2d at 558-59.

The court explained that, beginning with its opinion in *Watson v. Jones*,<sup>146</sup> “the Supreme Court began to place matters of church government and administration beyond the purview of civil authorities.”<sup>147</sup> *Watson* involved a church property dispute between rival factions of the Presbyterian Church. The U.S. Supreme Court affirmed a state court ruling which held that the civil courts were bound by the decision reached on the matter by the highest ecclesiastical governing body of the Presbyterian Church. At the time of the *Watson* decision, the First Amendment had not yet been held applicable to the states,<sup>148</sup> but the Court understood the principle governing its decision as a component of the American commitment to religious freedom:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the question of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept these decisions as final, and as binding on them, in their application to the case before them.<sup>149</sup>

The Court recognized that judicial practice in England had been different, but “the full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles”<sup>150</sup> demanded that the civil courts stay out of internal matters of church governance:

The right to organize voluntary religious associations and to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves

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<sup>146</sup> 80 U.S. 679 (1871).

<sup>147</sup> 460 F.2d at 559.

<sup>148</sup> *Watson* was a diversity case decided on the basis of general federal common law in the era prior to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>149</sup> 80 U.S. at 727

<sup>150</sup> 80 U.S. at 728.

to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would to the total subversion of religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.<sup>151</sup>

Eighty years later, in *Kedroff v. St. Nicholas Cathedral*,<sup>152</sup> another church property dispute gave the Supreme Court the opportunity to tie the principle articulated in *Watson* to the free exercise clause of the First Amendment.<sup>153</sup> In *Kedroff*, the Court struck down a New York statute that purported to transfer administrative control of the Russian Orthodox churches in North America from the Patriarch in Moscow to church authorities selected by a convention of Russian Orthodox groups in North America. Under the statute, the bishop appointed by the Patriarch in Moscow was denied access to the St. Nicholas Cathedral in New York. In holding that the New York statute was an unconstitutional burden on the free exercise of religion, the Court drew on its prior opinion in *Watson*. While *Watson* itself had not been decided under the free exercise clause,

the opinion radiate[d] ... a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy ... we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.<sup>154</sup>

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<sup>151</sup> 80 U.S. at 728-29.

<sup>152</sup> 344 U.S. 94 (1952)

<sup>153</sup> 344 U.S. at 115-16 (noting that *Watson* had been decided “before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action”).

<sup>154</sup> 344 U.S. at 154-55.



In light of *Watson* and *Kedroff*, the Fifth Circuit in *McClure* concluded that Title VII could not be applied to the employment relationship between Mrs. McClure and the Salvation Army without violating the First Amendment. The court explained that the issues raised by Mrs. McClure's employment discrimination claim – whether decisions made by the Salvation Army regarding her ministerial assignment, salary, and duties violated Title VII – were “matters of church administration and government and thus, *purely of ecclesiastical cognizance*.”<sup>155</sup> Adjudication of her claim would involve investigation and review of ecclesiastical practices and decisions and “would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern.” This might easily and improperly allow control of “strictly ecclesiastical matters” to “pass from the church to the State,” depriving the church of the power to decide for itself matters of church administration and governance.<sup>156</sup> Finally, the investigation and review involved in adjudicating a minister's employment discrimination claim “could only produce by its coercive effect the very opposite of the separation of church and State contemplated by the First Amendment.”

In short, allowing Mrs. McClure's employment discrimination claim to proceed “would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.” The court, however, backed away from holding that the case involved a conflict between a clearly applicable federal statute and a constitutional prohibition in which the statute must give way. The analysis up to this point seemed to demand that the

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<sup>155</sup> 460 F.2d at 560.

<sup>156</sup> *Id.*

court hold that First Amendment prevented application of Title VII in this case. Yet, in the last paragraph of the opinion, the *McClure* court abruptly chose to frame its holding in terms of constitutional avoidance.<sup>157</sup> “We ...hold that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.”<sup>158</sup> On this basis, the Fifth Circuit affirmed the district court’s dismissal for want of jurisdiction.<sup>159</sup>

Because of this avoidance strategy, the court’s actual holding might, in fact, be better understood as affirming dismissal of the action for failure to state a claim upon which relief can be granted, rather than for lack of subject matter jurisdiction. The court interprets the statute itself not to apply to the church-minister relationship; in other words, the statute fails to create a cause of action that would allow the minister to obtain relief for employment discrimination against her church employer. Yet the more plausible reading of Title VII, as the court itself recognized earlier in its opinion, “compel[s] the conclusion that Congress did *not* intend”<sup>160</sup> to exempt religious organizations from liability for discriminating on the basis of race, color, sex, or national origin. If ministerial claims are to be excluded, it must be because the Religion Clauses of the Constitution bar the federal government and the states from interfering with matters of purely ecclesiastical cognizance like the employment relationship between a church and its ministers. The government cannot regulate the relationship and the courts cannot adjudicate claims that implicate the relationship. Thus, the First Amendment removes

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<sup>157</sup> “[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” 460 F.2d at 560 (quoting *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

<sup>158</sup> 460 F.2d at 560-61; *see also* *Schleicher*, 2008 WL 516892, at \*2 (characterizing the ministerial exception as an interpretive rule, not a constitutional rule).

<sup>159</sup> 460 F.2d at 561.

<sup>160</sup> 460 F.2d at 558 (emphasis added).

disputes regarding church governance and administration from the subject matter jurisdiction of the civil courts, federal or state.

The Fourth Circuit adopted the more plausible reading of Title VII and addressed the constitutional issue head-on in *Rayburn v. General Conference of Seventh-Day Adventists*.<sup>161</sup> In *Rayburn*, the court held that the First Amendment barred a woman denied a pastoral position in the Seventh-Day Adventist Church from raising a Title VII sex and race discrimination claim against the Church. Unlike the Fifth Circuit in *McClure*, the *Rayburn* court concluded that it could not “impose upon a statute a limiting construction where to do so would strain congressional intent.” Here, the “language and legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent.” Thus, Ms. Rayburn’s claim produced a collision between Title VII and the First Amendment that the court could not avoid.

The Fourth Circuit in *Rayburn* was able to draw on an additional precedent in the Supreme Court’s *Watson-Kedroff* line of church autonomy cases. In *Serbian Eastern Orthodox Diocese v. Milivojevic*,<sup>162</sup> decided four years after *McClure*, the Court held that the Illinois Supreme Court violated the First and Fourteenth Amendments by issuing a decision that invalidated a reorganization plan adopted by the American-Canadian Diocese of the Serbian Eastern Orthodox Church. The case arose after the Holy Assembly of Bishops and Holy Synod of the Serbian Orthodox Church (the Mother Church) removed Dionisije Milivojevic as bishop of the American-Canadian diocese. The removal followed Milivojevic’s refusal to accept the reorganization plan adopted by

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<sup>161</sup> 772 F.2d 1164 (4<sup>th</sup> Cir. 1985). The Seventh Circuit’s recent reversion to the interpretive rule understanding of the ministerial exception, *see* Schliecher, 2008 WL 516892, at \*2, makes no reference to the Fourth Circuit’s analysis in *Rayburn*.

<sup>162</sup> 426 U.S. 696 (1976).

the Holy Assembly and refused to turn administration of the Diocese over to a new bishop appointed by the Holy Assembly.<sup>163</sup> Milivojevich sought an injunction in Illinois state court to prevent the Mother Church from interfering with diocesan assets and to have himself declared the true Diocesan Bishop.<sup>164</sup> The Illinois Supreme Court ultimately held that Milivojevich's removal had to be set aside as "arbitrary," because the removal was "not conducted according to the Illinois Supreme Court's interpretation of the Church's constitution and penal code."<sup>165</sup> The court further held that "the Diocesan reorganization was invalid because it was beyond the scope of the Mother Church's authority to effectuate such changes without Diocesan approval."<sup>166</sup>

The U.S. Supreme Court reversed. The Court explained that "[t]he fallacy fatal to the judgment of the Illinois Supreme Court" was that court's "impermissible rejection of the decisions of the highest ecclesiastical tribunals" of the hierarchical Mother Church on the disputed issues.<sup>167</sup> The Illinois court "impermissibly substitute[d] its own inquiry into church polity" in resolving the dispute between Milivojevich and the Mother Church.<sup>168</sup> Allowing civil courts to "probe deeply enough into the allocation of power" within a hierarchical church to allow it to decide disputes regarding church polity and administration violates the First Amendment "in much the same manner as civil determination of religious doctrine."<sup>169</sup> When civil courts try to decide such disputes,

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<sup>163</sup> 426 U.S. at 703-05.

<sup>164</sup> 426 U.S. at 707-08.

<sup>165</sup> 426 U.S. at 708.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> 426 U.S. at 709 (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

“the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.”<sup>170</sup>

Drawing on the principles first articulated in *Watson*, the Court explained that any inquiry into whether a church’s decisions complied with its own church laws and regulations violated “the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.”<sup>171</sup> The Court’s precedents established a “general rule that religious controversies are not the proper subject of civil court inquiry, and ... a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.”<sup>172</sup> By ordering Milivojeovich’s reinstatement as a bishop, even though the Mother Church considered him to be a schismatic, the Illinois Supreme Court had “unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals” of the Mother Church.<sup>173</sup> The diocesan reorganization undertaken by the Mother Church was a matter of “internal church governance, an issue at the core of ecclesiastical affairs,” and, as the U.S. Supreme Court said in *Kedroff*, “religious freedom encompasses the ‘power [of religious bodies] to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine.’”<sup>174</sup>

The protection for church autonomy established by the Supreme Court in the *Watson-Kedroff-Milivojeovich* line of cases led the Fourth Circuit in *Rayburn* to conclude

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<sup>170</sup> 426 U.S. at 711 (quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969)).

<sup>171</sup> 426 U.S. at 713.

<sup>172</sup> *Id.*

<sup>173</sup> 426 U.S. at 720.

<sup>174</sup> 426 U.S. at 721-22 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

that adjudicating Ms. Rayburn's employment discrimination claim was prohibited by the Religion Clauses of the First Amendment. A church's free exercise rights are burdened by any attempt "to restrict a church's free choice of its leaders." This is a substantial burden on religious freedom, because "[t]he right to choose ministers without government restriction underlies the well-being of religious community."<sup>175</sup> Indeed, "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."<sup>176</sup> While the elimination of employment discrimination is an interest whose magnitude is "difficult to exaggerate,"<sup>177</sup> introducing government standards into the selection of ministers is a burden that is too substantial to permit: it "would significantly, and perniciously, rearrange the relationship between church and state."

In order to maintain the constitutionally mandated relationship between church and state, churches must possess "the unfettered right ... to resolve certain questions."<sup>178</sup> Therefore, "[i]n 'quintessentially religious' matters, the free exercise clause protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content."<sup>179</sup> The question of who is to serve as a minister is one of those quintessentially religious matters that the Constitution places beyond the legitimate authority of the state.

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<sup>175</sup> 772 F.2d at 1167.

<sup>176</sup> 772 F.2d at 1168.

<sup>177</sup> 772 F.2d at 1168; *see also* 772 F.2d at 1169 ("As Title VII is an interest of the highest order, courts have held that Title VII properly applied to the secular employment decisions of a religious institution .... But court must distinguish incidental burdens on free exercise in the service of a compelling state interest from burdens where 'the inroad on religious liberty' is too substantial to be permissible.").

<sup>178</sup> 772 F.2d at 1169.

<sup>179</sup> 772 F.2d at 1169 (quoting *Milivojeovich*, 426 U.S. at 720).

The Fourth Circuit also explained that subjecting a church's ministerial choices to Title VII scrutiny would violate the establishment clause by "giv[ing] rise to 'excessive governmental entanglement' with religious institutions." The establishment clause operates to keep government out of the sphere reserved to religion:

Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise "that both religion and government can work best to achieve their lofty aims if each is left free of the other within its respective sphere."<sup>180</sup>

Yet, to affirm that the church has freedom in the religious sphere is not to claim for the church complete freedom from the law:

Of course churches are not – and should not be – above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.<sup>181</sup>

The case of a ministerial employment decision, however, is different. Such a decision does involve the church's spiritual functions, and thus, the Constitution *does* place the decision beyond the reach of the law. With respect to the question of who a church selects to serve as its minister, "the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those selected or rejected."<sup>182</sup> To say that the Constitution requires civil authorities to "decline to review" a particular class of cases seems to be another way of saying that the Constitution removes that class of cases from the subject matter jurisdiction of the civil courts.

C. *Subject Matter Jurisdiction Characteristics of the Ministerial Exception*

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<sup>180</sup> 772 F.2d at 1171 (quoting *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948)).

<sup>181</sup> 772 F.2d at 1171.

<sup>182</sup> *Id.*

The case of *Bell v. Presbyterian Church*<sup>183</sup> provides a clear example of the way in which this jurisdictional bar operates – even when the federal jurisdictional statutes provide a textual basis for the exercise of federal jurisdiction. James M. Bell was an ordained minister who was called by Interfaith Impact to serve as its executive director.<sup>184</sup> Four national religious organizations (including the Presbyterian Church, U.S.A.) created and funded Interfaith Impact, which was a non-profit corporation whose mission was “to advance the jointly shared religious purposes of its members, namely, to carry out their theological imperative to increase the possibilities for peace, economic and social justice.”<sup>185</sup> In the engagement letter that outlined the terms of Rev. Bell’s service, Interfaith noted that this service “would be an extension of his ministry” as an ordained minister in the United Church of Christ. Three years after Rev. Bell began his service with Interfaith, a financial crisis in the organization arose, and the Presbyterian Church decided not to allocate any funds to Interfaith for the coming year. This led Interfaith’s board of directors decided to continue Interfaith’s ministry with a volunteer staff, and it terminated Rev. Bell’s service as executive director as part of a complete reduction in force.<sup>186</sup>

Bell then filed suit against the principal contributing religious organizations. His complaint alleged a number of state-law tort and contract claims in an effort to challenge the defendants’ “expressed reason for ending the program and terminating his employment.”<sup>187</sup> The action was filed in the U.S. District Court for the Eastern District of Virginia, and the complaint invoked diversity of citizenship as the basis for federal

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<sup>183</sup> 126 F.3d 328 (4<sup>th</sup> Cir. 1997).

<sup>184</sup> 126 F.3d at 330.

<sup>185</sup> 126 F.3d at 329.

<sup>186</sup> 126 F.3d at 330.

<sup>187</sup> 126 F.3d at 330.



jurisdiction.<sup>188</sup> While the defendants did not contest the existence of diversity of citizenship,<sup>189</sup> the district court granted the defendants' 12(b)(1) motion to dismiss for lack of subject matter jurisdiction on the ground that the "essential core of the case" involved the Churches' decisions to allocate their funds as they saw fit."<sup>190</sup> Because "Rev. Bell's lawsuit intruded over internal church matters over which civil courts do not have subject matter jurisdiction," the court dismissed the action with prejudice.<sup>191</sup>

The Fourth Circuit affirmed. Drawing on *Watson*, *Kedroff*, and *Milivojeovich*, the court explained that "civil courts have long taken care not to intermeddle in internal ecclesiastical disputes."<sup>192</sup> "In keeping with the First Amendment's" protection of religious freedom,<sup>193</sup> it has "become established that the decisions of religious entities about the appointment and removal of ministers and persons in other positions of similar theological significance are beyond the ken of civil courts."<sup>194</sup> The court, therefore, articulated the key question in the case in this way: was the lawsuit between Rev. Bell and the four national churches an ecclesiastical dispute about "discipline, faith, internal organization, or ecclesiastical rule, custom or law,"<sup>195</sup> or, was this "a case in which we should hold religious organizations liable in civil courts for 'purely secular disputes

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<sup>188</sup> See *Bell v. Presbyterian Church (U.S.A.)*, Brief for the Plaintiff-Appellant James M. Bell, 1996 WL 33453752 (4<sup>th</sup> Cir.), at \*v (noting that jurisdiction in the action against the corporate defendants was based on 28 U.S.C. § 1332(a)(1)).

<sup>189</sup> *Id.*

<sup>190</sup> *Bell v. Presbyterian Church (U.S.A.)*, Brief for the Appellees, 1996 WL 33453754 (4<sup>th</sup> Cir.) (Statement of the Case).

<sup>191</sup> *Id.*

<sup>192</sup> 126 F.3d at 330; see also 126 F.3d at 330-31 (discussing *Watson*, *Kedroff*, and *Milivojeovich*).

<sup>193</sup> 126 F.3d at 330.

<sup>194</sup> 126 F.3d at 331.

<sup>195</sup> *Id.* (quoting *Milivojeovich*, 426 U.S. at 713).

between third parties and a particular defendant, albeit a religiously affiliated organization”<sup>196</sup>

The court concluded that the lawsuit was best characterized as an ecclesiastical dispute. While the complaint was framed in terms of tort and contract claims, Bell’s allegations, “[a]t bottom, . . . focuse[d] on how the constituent churches spen[t] their religious outreach funds.”<sup>197</sup> Judicial resolution of that question would “interpose the judiciary” into decisions at the heart of how the defendant churches governed their spiritual mission, decisions “relating to how and by whom they spread their message and specifically their decision to select their outreach ministry through the granting or withholding of funds.”<sup>198</sup> These decisions “about the nature, extent, administration, and termination of a religious ministry fall[ ] within the ecclesiastical sphere the First Amendment protects from civil court intervention.”<sup>199</sup> Accordingly, even though the diversity statute purported to authorize federal jurisdiction over Rev. Bell’s lawsuit, the court concluded that his claim fell with the category of cases that the First Amendment removes from the subject matter jurisdiction of the civil courts.

Unlike the defense of failure to state a claim upon which relief can be granted, the issue of subject matter jurisdiction can be raised at any point in the course of judicial proceedings,<sup>200</sup> and the subject matter jurisdiction issue can be raised by the court sua

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<sup>196</sup> *Id.* (quoting *General Council on Finance and Administration of the United Methodist Church v. California Superior Court*, 439 U.S. 1369, 1373 (1978) (Rehnquist, Circuit Justice)).

<sup>197</sup> 126 F.3d at 332.

<sup>198</sup> *Id.*

<sup>199</sup> 126 F.3d at 333.

<sup>200</sup> Compare FED. R. CIV. P. 12(h)(3) (“Whenever it appears by suggestion of the parties *or* otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”) with FED. R. CIV. P. 12(h)(2) (“A defense of failure to state a claim upon which relief may be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.”)

sponte.<sup>201</sup> Judge Oberdorfer of the U.S. District Court for the District of Columbia treated the ministerial exception in just this way in *Equal Employment Opportunity Commission v. Catholic University of America*.<sup>202</sup> The case was brought by the EEOC and Sister Elizabeth McDonough, who alleged that Catholic University had engaged in sex discrimination and retaliation in violation of Title VII when it denied Sister McDonough's application for tenure in the university's Department of Canon Law.

*After the trial concluded*, and the parties had submitted proposed findings and conclusions in the case, Judge Oberdorfer requested that the parties file briefs "addressing the question [of] whether the First Amendment precludes maintenance and adjudication of Sister McDonough's claims."<sup>203</sup> The judge had begun to question his constitutional authority to hear the case in the midst of the trial, because much of the testimony concerned the quality of Sister McDonough's canon law scholarship, especially as compared to the work of the two most recent applicants for tenure in the department, both of whom were men. This caused Judge Oberdorfer to express "his uneasiness at 'sitting on the qualifications of an expert in canon law'" and to suggest that "the line of inquiry was getting awful[ly] close to entangling the government and the judiciary in religious matters."<sup>204</sup> After hearing post-trial oral argument on the

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<sup>201</sup> See FED. R. CIV. P. 12(h)(3) (the appearance of lack of subject-matter jurisdiction can be raised "by suggestion of the parties or otherwise").

<sup>202</sup> 856 F. Supp. 1 (D.D.C. 1994), *aff'd*, 83 F.3d 455 (D.C. Cir. 1996); see also Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 34 n.162 (2005) ("Because the limitations [of the ministerial exception], born of both Establishment and Free Exercise considerations, go to subject matter jurisdiction of the civil courts, judges can and do raise them sua sponte."); *id.* (noting that court of appeals in *Catholic University* "approv[ed] of the district court's refusal to proceed with adjudication of [the plaintiffs' Title VII claim against] Catholic University, despite the parties' willingness to proceed on the merits").

<sup>203</sup> 856 F. Supp. at 2.

<sup>204</sup> 83 F.3d at 459 (quoting Nov. 4, 1993 Trial Transcript at 9-10); see also *id.* ("I've got to pass on people's judgment about colleagues in a religious setting ... and when I hear this ... aggressive examination of a priest about what is at least partly his clerical duties, I've got a problem.") (quoting Nov. 5, 1993 Trial Transcript at 147).

constitutional question, the judge concluded that Sister McDonough's role in the Canon Law department required her to be characterized as a ministerial employee of a religious institution. Accordingly, applying Title VII to the facts and relationships in her case "would violate both the Free Exercise and the Establishment Clauses by entangling government in a primarily religious function and relationship,"<sup>205</sup> and the district court dismissed the case without reaching the merits.<sup>206</sup> Both the court's *sua sponte* introduction of the First Amendment question *after trial*<sup>207</sup> and the court's conclusion that it was without constitutional authority to decide the action on the merits demonstrate that the court understood the ministerial exception to be an issue of subject matter jurisdiction, rather than a matter of the sufficiency of the plaintiff's claim.<sup>208</sup>

These cases support the conclusion reached by the district court in *Petruska*: "the ministerial exception partakes of jurisdictional qualities, as it implicates constitutionally mandated restraints on [a court's] power to adjudicate certain types of employment disputes."<sup>209</sup> This sort of "constitutionally compelled limitation on civil authority"<sup>210</sup> with respect to particular category of disputes – particular subject matter – is best described as a limitation on court's subject matter jurisdiction. The limitation on the

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<sup>205</sup> 856 F. Supp. at 9.

<sup>206</sup> 83 F.3d at 460. Judge Oberdorfer explained that the investigation and proceeding "ha[d] impermissibly entangled the civil authorities in religious decision-making." Such entanglement impairs "a religious institution's choice of those who teach its doctrine and participate in church governance. Therefore, the religion clauses of the First Amendment preclude decision of this Title VII action on its merits." 856 F. Supp. at 13.

<sup>207</sup> See FED. R. CIV. P. 12(h)(3).

<sup>208</sup> See 2 MOORE'S FEDERAL PRACTICE § 12.34[6][a] (3d ed. 2005) ("A dismissal for failure to state a claim is a judgment on the merits, unlike dismissals for lack of subject matter or personal jurisdiction . . ."); see also *Kirkham v. Societe Air France*, 429 F.3d 288, 291 (D.C. Cir. 2005) (a court can render a decision on the merits "only after jurisdiction has been established"); *Winslow v. Walters*, 815 F.2d 1114, 1116 (7<sup>th</sup> Cir. 1987) ("Seeking summary judgment on a jurisdictional issue . . . is the equivalent of asking a court to hold that because it has no jurisdiction the plaintiff has lost on the merits. This is a nonsequitur.").

<sup>209</sup> *Petruska v. Gannon University*, 350 F. Supp.2d 666, 682 (W.D. Pa. 2004), *aff'd in part on other grounds*, 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

<sup>210</sup> *Equal Employment Opportunity Commission v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 (4<sup>th</sup> Cir. 2000).

scope of civil jurisdiction manifest in the ministerial exception “ensures that no branch of secular government trespasses on the most spiritually intimate grounds of a religious community’s existence.”<sup>211</sup> As the Seventh Circuit explained in *Tomic v. Catholic Diocese of Peoria*,<sup>212</sup> the court explained that courts are “secular agencies” that do not possess the power to “exercise jurisdiction over the internal affairs of religious organizations.”<sup>213</sup> Intra-ecclesial doctrinal disputes “ha[ve] never been justiciable in the federal courts,”<sup>214</sup> and lawsuits that implicate the governance structure of a church, even when they do not raise a question of religious doctrine, *lie outside the power of the courts*. Secular “courts will not assume jurisdiction if doing so would interfere with the church’s management.”<sup>215</sup>

#### D. *Qualified Immunity or Sovereign Immunity?*

The ministerial exception cases sometimes describe the exception as protecting a sphere in which religion is sovereign. In *Catholic University*, for example, the D.C. Circuit explained its conclusion that ministerial exception doctrine still survives after the

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<sup>211</sup> *Id.*

<sup>212</sup> 442 F.3d 1036 (7<sup>th</sup> Cir.), *cert. denied*, 127 S. Ct. 190 (2006).

<sup>213</sup> 442 F.3d at 1037.

<sup>214</sup> 442 F.3d at 1038.

<sup>215</sup> *Id.* While the court in *Tomic* was addressing limits on the power of the federal courts, *id.*, state courts also recognize that they lack the power to adjudicate lawsuits implicating a church’s ministerial employment relationships and internal governance structures. *See, e.g.*, *Westbrook v. Penley*, 231 S.W.2d 389, 405 (Tex. 2007) (professional-negligence claim against minister must be dismissed for lack of subject matter jurisdiction because they “unconstitutionally impinges upon internal matters of church governance in violation of the First Amendment”); *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d 301, 303-04, 308-09 (Mass. 2004) (constitutional rights of religious freedom prohibit trial court from exercising subject matter jurisdiction over pastor’s employment discrimination claims against church employer); *Williams v. Episcopal Diocese of Mass.*, 766 N.E.2d 820, 824 (Mass. 2002) (Massachusetts case law “firmly establishe[s]” the principle that the First Amendment’s protection of religious freedom “precludes jurisdiction of civil courts over church disputes touching on matters of doctrine, canon law, polity, discipline, and ministerial relationships”); *McDonnell v. Episcopal Diocese of Georgia*, 381 S.E.2d 126, 127 (Ga. App.), *cert. denied*, 493 U.S. 935 (1989) (affirming summary judgment to the diocese in an action brought by priest alleging breach of an employment contract; “The civil court cannot take jurisdiction of an ecclesiastical issue even if the parties present it for resolution, because the First Amendment prohibits such action by the civil judicial system.”).

Supreme Court's decision in *Employment Division v. Smith*<sup>216</sup> in these terms: "[W]e cannot believe that the Supreme Court in *Smith* intended to qualify the[e] century-old affirmation of a church's sovereignty over its own affairs."<sup>217</sup> The Constitution recognizes that churches have sovereignty over their own internal affairs with respect to ministerial employment – in other words, the Constitution protects a church's "right of autonomy in its own domain"<sup>218</sup> – and this sovereignty overrides even the state's strong interest in eliminating employment discrimination.<sup>219</sup> Similarly, the Fourth Circuit in *Rayburn* understood the ministerial exception as a manifestation of the Supreme Court's assertion that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."<sup>220</sup> Thus, the ministerial exception follows from the proposition that the First Amendment "recognizes two

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<sup>216</sup> 494 U.S. 872 (1990).

<sup>217</sup> 83 F.3d at 463; *see also* *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 349 (quoting *Catholic University*). The "century-old affirmation of a church's sovereignty over its own affairs" refers to the line church autonomy cases that find their foundation in *Watson v. Jones*, 80 U.S. 679 (1871), *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Every circuit to have addressed the question of the post-*Smith* survival of the ministerial exception have recognized the exception's continued validity. *See* *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 n.\* (4<sup>th</sup> Cir. 2000) (citing cases). One circuit, over a strong dissent, seems to have avoided the question of the post-*Smith* validity of the ministerial exception by pointing to the Religious Freedom Restoration Act (RFRA), not the ministerial exception, as the proper defense to be raised in a Methodist minister's action against the church under the Age Discrimination in Employment Act. *See* *Hankins v. Lyght*, 441 F.3d 96, (2d Cir. 2006); *see also* 441 F.3d at 109-19 (rejecting the court's RFRA analysis in favor of a statutory ministerial exception) (Sotomayor, J., dissenting); *see also* *Tomic*, 442 F.3d at 1042 (criticizing *Hankins* as "unsound" because RFRA is applicable only to suits in which the government is a party). As the *Tomic* court explained,

It is hardly to be imagined ... that in seeking to broaden the protection of religious rights [after *Smith*], Congress, dropping nary a hint, wiped out a long-established doctrine that gives greater protection to religious autonomy than RFRA does. Indeed, a serious constitutional issue would be presented if Congress by stripping away the ministerial exception required courts to decide religious questions. The exception is based on the establishment and free-exercise clauses of the First Amendment, which place tight limits on governmental authority to regulate religion.

442 F.3d at 1042 (citations omitted).

<sup>218</sup> 83 F.3d at 467.

<sup>219</sup> *Id.*

<sup>220</sup> *McCullum v. Board of Education* 333 U.S. 402, 410 (1948), *quoted* in *Rayburn*, 772 F.2d at 1171.

spheres of sovereignty”<sup>221</sup> that structure the institutional relationship between government and religion.

Rooting the ministerial exception in the First Amendment’s recognition of a protected sphere of religious sovereignty provides further support for understanding the exception as a matter of subject matter jurisdiction. The Third Circuit in *Petruska* used an analogy to qualified immunity in support of its conclusion that the ministerial exception should be understood as a defense challenging the sufficiency of the plaintiff’s claim, rather than as a challenge to the court’s subject matter jurisdiction. But the better analogy may be to the jurisdictional defense of sovereign immunity, rather than the defense of qualified immunity. While it is appropriate to raise the defense of qualified immunity in a 12(b)(6) motion to dismiss for failure to state a claim,<sup>222</sup> the defense of sovereign immunity is generally understood to be an issue of subject matter jurisdiction<sup>223</sup> properly raised in a 12(b)(1) motion to dismiss.<sup>224</sup>

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<sup>221</sup> *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007). See also Part II, *supra* (the structural establishment protects a sphere of sovereignty for the church); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1392 (2004) (the no-establishment principle presupposes “the existence of dual authorities, each with its own sphere of proper jurisdiction and each with some jurisdiction held to the exclusion of the other”; “[S]ince the fourth century Western civilization has presupposed that there are not one but two sovereigns. Each has a jurisdiction of legitimate operation, and while there are areas of shared cognizance, there are other subject matter areas in which each is noncompetent to perform the tasks of the other.”).

<sup>222</sup> See, e.g., *Goodman v. Town of Golden Beach*, 988 F. Supp. 1450, 1455 (S.D. Fla. 1997) (“A government official’s entitlement to qualified immunity is a question of law that is appropriately determined before trial in one of three ways: (1) on a [Rule 12(b)(6)] motion to dismiss for failure to state a claim; (2) in a [Rule 12(c)] request for judgment on the pleadings; or (3) on [Rule 56] motion for summary judgment.”)

<sup>223</sup> See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 474 (1994) (“Sovereign immunity is jurisdictional in nature.”) (referring to federal sovereign immunity); WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1354 (“The natural consequence of the sovereign immunity principle is that the absence of consent by the United States is a fundamental defect that deprives the court of subject matter jurisdiction.”); *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) (“the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal courts’ judicial power, and therefore can be raised at any stage of the proceedings”); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (“[T]his Court has recognized that [the] greater significance [of the Eleventh Amendment] lies in its affirmation that the fundamental principle of [state] sovereign immunity limits the grant of judicial authority in Art. III.”); *United States v. Texas Tech University*, 171 F.3d 279, 285 (5<sup>th</sup> Cir. 1999) (“The Eleventh Amendment’s admonition is

The ministerial exception exists because the Constitution denies courts the authority to decide a defined category of cases. Similarly, the various aspects of the doctrine of sovereign immunity deny courts the authority to hear and decide a defined category of cases: claims against governmental sovereigns, which are barred unless the sovereign has consented to suit,<sup>225</sup> or, in the case of foreign sovereigns, unless Congress has granted the federal courts authority to hear the case.<sup>226</sup> Unlike foreign sovereign immunity, which is a matter of grace and comity on the part of the United States, ... not a restriction imposed by the Constitution,”<sup>227</sup> the ministerial exception is a constitutionally imposed restriction on the power of courts. Thus, when the ministerial exception applies, the Religion Clauses of the First Amendment limit the Article III power of the federal courts in a way similar to the limit imposed on federal judicial power by the Eleventh Amendment and the doctrine of state sovereign immunity. While the Eleventh

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jurisdictional in nature. ...”; it accomplishes its purpose of “preserving state sovereign immunity ... through jurisdictional limitation”); *cf.* *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 391 (1998) (“we have not decided” the question of whether “Eleventh Amendment immunity is a matter of subject-matter jurisdiction”); *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring) (because it can be waived and courts need not raise it *sua sponte*, “the jurisdictional bar erected by the Eleventh Amendment” has a “hybrid nature”); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (unlike Article III limits on judicial power which altogether disqualify federal court from deciding cases outside the reach of Article III, Eleventh Amendment sovereign immunity can be waived; “The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction.”).

<sup>224</sup> *See, e.g., Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007) (because sovereign immunity is jurisdictional in nature, where a waiver of sovereign immunity does not apply, a suit should be dismissed under Rule 12(b)(1), not 12(b)(6)); *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469, 476 (6<sup>th</sup> Cir. 2006) (threshold defense of state sovereign immunity is usually invoked “by way of motion to dismiss under Rule 12(b)(1)”; *Kirkham*, 429 F.3d at 291 (“[P]arties seeking [Foreign Sovereign Immunity Act] immunity do so through Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction.”); *WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE* § 1350 (the 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is appropriate “when the plaintiff’s claim is barred by one of the various aspects of the doctrine of sovereign immunity”).

<sup>225</sup> *See United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.”)

<sup>226</sup> *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2355 (2007) (the Foreign Sovereign Immunities Act “‘provides the sole basis for obtaining jurisdiction over a foreign state in federal court’”) (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 439 (1989)).

<sup>227</sup> *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).



Amendment has been interpreted as “an exemplification” of a “fundamental rule” of state sovereignty,<sup>228</sup> the line of cases stemming from *Watson* teach that the First Amendment stands as an exemplification of a fundamental rule of church autonomy. Like the Eleventh Amendment, the jurisdictional bar raised by the First Amendment ministerial exception “operates as an additional boundary on [judicial] power, supplementing the restraints on judicial power already implicitly provided in Article III of the Constitution.”<sup>229</sup>

The defense of qualified immunity is quite different. Qualified immunity is not a limitation on judicial power to hear and decide a certain category of cases. Instead, qualified immunity protects certain categories of defendants from having to defend a suit under certain factual conditions. “The defense of ‘qualified immunity’ requires courts to enter judgment in favor of a government employee unless the employee’s conduct violates ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’”<sup>230</sup> The subject matter of the lawsuits against government officials are clearly within the judicial power of the court, and if the relevant factual conditions do not exist, the defendant will be required to defend the action and the court has the power to enter judgment against them.<sup>231</sup>

This protection afforded governmental officials by the defense of qualified immunity is not mandated by the Constitution. Instead, the Supreme Court has created the existing doctrine of qualified immunity in order to foster particular policy goals:

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<sup>228</sup> See *In re State of New York*, 256 U.S. 490, 497 (1921).

<sup>229</sup> *Texas Tech.*, 171 F.3d at 285 (referring to the Eleventh Amendment).

<sup>230</sup> *Morse v. Frederick*, 127 S. Ct. 2618, 2640 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>231</sup> See Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 10-11 (1997) (describing the availability of damages in *Bivens* actions and under § 1983).

providing immunity from suit for “all but the plainly incompetent or those who knowingly violated the law”<sup>232</sup> is intended to reduce the social costs of litigation against governmental officials, which include “the increased expense to the government, the diversion of official attention from official duties, and the deterrence of able citizens from pursuing public office.”<sup>233</sup> Because this particular structure of immunity protection is not required by the Constitution, Congress could, if it wished, create a different sort of immunity defense in actions against governmental employees that allege violations of constitutional or statutory rights.<sup>234</sup> In contrast, the ministerial exception is a constitutionally compelled limitation on the power of civil authorities. Thus, the analogy to qualified immunity invoked by the Third Circuit in *Petruska* is not persuasive. The ministerial exception seems more closely akin to the jurisdictional defense of sovereign immunity, rather than to the conditional immunity from suit defense established by the doctrine of qualified immunity.

E. *Does It Matter?*

It may seem as though the question of whether the ministerial exception should be characterized as a jurisdictional defense or as a defense challenging the legal sufficiency of the plaintiff’s claim is a question without practical significance.<sup>235</sup> Whether the exception is asserted as a 12(b)(1) defense or as a 12(b)(6) defense, the plaintiff’s claim will be dismissed at the outset of the litigation if the ministerial exception applies. If

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<sup>232</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>233</sup> Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1161 (2005) (citing *Harlow*, 457 U.S. at 814); *see also* Chen, *supra* note \_\_\_, at 11-12 (immunity law arises out of the Supreme Court’s struggle to balance the benefits of compensating individuals harmed by official misconduct against the competing social policy concerns that arise from lawsuits against public officials).

<sup>234</sup> *See* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L.J. 447, 461-63 & 461-62 n.59 (1978).

<sup>235</sup> *Cf. Schleicher*, 2008 WL 516892, at \*5 (characterizing dismissal under Rule 12(b)(1) rather than under Rule 12(c) as a “mistake, though a harmless one”).

there “is no realistic possibility” that dismissing the action for failure to state a claim “will expand the court’s power beyond the limits that the jurisdictional restriction has imposed,”<sup>236</sup> why spend much energy thinking about this question? There are at least two reasons why it is important to get the answer to this question right.

### 1. Clear Affirmation of the Penultimacy of the State

Limits on the subject matter jurisdiction of courts are a manifestation of limitations on governmental power. This is the most important reason why a proper understanding the jurisdictional character of the ministerial exception makes a difference in the law. When federal and state courts clearly and consistently treat the ministerial exception as a limitation on their subject matter jurisdiction, they make a powerful statement about the foundations of limited government: Such statements affirm the penultimacy of the state.<sup>237</sup> The ministerial exception is rooted in this fundamental

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<sup>236</sup> Cf. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000). The Court in *Vermont Agency* was faced with a case that raised two questions: (1) whether the federal False Claims Act should be interpreted to create a cause of action that permits an individual to bring an action on behalf of the United States against a state, and (2) whether such a suit by an individual against a state would be barred by the Eleventh Amendment. The Court concluded that the question of statutory interpretation was logically antecedent to the Eleventh Amendment question and that there was “no realistic possibility that addressing the statutory question [would] expand the Court’s power beyond the limits that the jurisdictional restriction has imposed. The question whether the statute provide[d] for suits against the States ... d[id] not, as a practical matter, permit the court to pronounce upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry anyway.” 529 U.S. at 779. The Court explained that “[t]his combination of logical priority and virtual coincidence of scope makes it possible, and indeed appropriate, to decide the statutory issue first.” 529 U.S. at 779-80. In the context of the ministerial exception, however, the court is not faced with the logically prior question of whether or not the law creates a cause of action allowing a particular employment discrimination claim to be asserted against a religious institution. The ministerial plaintiff typically has raised a claim under a statute that creates a cause of action for employment discrimination that (as the Fourth Circuit held in *Rayburn*, in the Title VII context) creates no statutory exception excluding religious employers from the coverage of the statute. The constitutional question of whether the First Amendment limits the judicial authority to decide this class of cases must, therefore, be confronted directly. Such “[q]uestions of jurisdiction, of course, should be given priority – since if there is no jurisdiction there is no authority to sit in judgment of anything else.” 529 U.S. at 778 (citing *Steel Co.*, 523 U.S., at 93-102).

<sup>237</sup> The phrase, “penultimacy of the state,” is drawn from Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 865 (2000); cf. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 77 (2003) (“‘Under God’ in the Pledge of Allegiance is a means for the state to declare that it is a limited institution that is subject to, and does not interfere with, higher commitments and norms. In a religiously pluralistic society, however,

principle of limited government: the civil authority, including the courts, has “a constitutionally prescribed sphere of action,”<sup>238</sup> and this civil sphere of authority is separate from the sphere of action reserved to religion.

As the Supreme Court noted in *Steel Co.*,

Much more than legal niceties are at stake here. The ... constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.<sup>239</sup>

Thus, because the ministerial exception recognizes a constitutional limit to authorized judicial action, it has a “separation and equilibration of powers” function. It keeps the power of government separate from a sphere of action exclusively reserved to religion. When a court fails to recognize that limitation on its power, the court acts ultra vires, and offends the fundamental constitutional principle of non-establishment.<sup>240</sup>

Paying careful attention to the limits of governmental power is about much more than “legal niceties.” The way in which courts speak about the character of the ministerial exception shapes the way judges, lawyers, and citizens understand the relationship between government and religion. The law has a pedagogical function, and the ways in which the law speaks to us (and the ways in which we speak about the law) shape the way we look at the world.<sup>241</sup> As Cathleen Kaveny explains, “Always and

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‘under God’ is an imperfect way of making that declaration. But if ‘under God’ is removed from the Pledge, the state must ... make other efforts to declare and respect its own limits.”).

<sup>238</sup> *Steel Co.*, 523 U.S. at 102 n.4 (subject-matter jurisdiction limitations keep courts “within their constitutionally prescribed sphere of action”).

<sup>239</sup> 523 U.S. at 101-02.

<sup>240</sup> *Cf. Steel Co.*, 523 U.S. at 94 (for a court to decide a merits question before addressing the jurisdictional question of standing “carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers”).

<sup>241</sup> *See, e.g., J.B. WHITE, HERACLES BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 28, 35 (1985) (law is a form of “constitutive rhetoric”; the study of law is an inquiry into the ways in which “we

everywhere, law teaches a moral lesson – it imbues a vision of how the members of a particular society should live their lives together.”<sup>242</sup> We should attend to the jurisdictional character of the ministerial exception, because the ministerial exception teaches an important lesson; the ministerial exception serves as a critical institutional reminder of what Robert Tuttle has called “government’s penultimate – government’s reticence, and even respect, in the face of its citizens’ obligations to the transcendent.”<sup>243</sup>

Professor Tuttle argues that the distinctive place occupied by religious institutions in the American constitutional order serves to highlight the state’s reticence before the transcendent. When the First Amendment bars application of otherwise neutral employment discrimination laws to the ministerial choices of religious institutions, the Constitution “testifies to the limited nature of its own authority.”<sup>244</sup> For Tuttle, “this testimony lacks a clear secular justification – precisely because it is a theological argument. ... The exceptional nature of religious belief and conduct depends on a religious justification: that God is God, and the state is not.”<sup>245</sup>

Tuttle and his colleague Ira Lupu have tried to articulate a justification for the distinctive role of religion in the constitutional that they argue is rooted in a political concept of religion, rather than in a theological starting point. Their argument, however,

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constitute ourselves as individuals, as communities, and as cultures, whenever we speak” as lawyers and judges) (1985); Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 101, 111-12, 135, 138-39 (2006) (noting that how we talk about the law, and how we hear courts talking about the law, has an effect on who we become as people); M. Cathleen Kaveny, *Assisted Suicide, the Supreme Court, and the Constitutive Function of the Law*, 27 HASTINGS CENTER REPORT 29 (1997) (“[T]hose who play a role in the legal enterprise are engaged in a type of ‘constitutive rhetoric’ that actually helps shape the moral identity of the community in which they participate. The community constituting character of law does not inhere solely in the results that issue in particular cases, but also in the very way the questions are framed for decision.”)

<sup>242</sup> M. Cathleen Kaveny, *Autonomy, Solidarity and Law’s Pedagogy*, 27 LOUVAIN STUDIES 339, 341 (2002). Once we “acknowledge the fact that law teaches,” we can “take responsibility for what it teaches.” *Id.*

<sup>243</sup> Tuttle, *How Firm a Foundation?*, *supra* note \_\_\_, at 865.

<sup>244</sup> *Id.* at 923.

<sup>245</sup> *Id.*

resonates with both Professor Esbeck's theory of the structural establishment clause and with John Courtney Murray's understanding of the freedom of the church. Lupu and Tuttle begin with the proposition that the founders established a new political order that was distinguished by its "limited horizons." "Its powers would be restricted to the temporal welfare of its citizens." This limit on the jurisdiction of government, precluding government from having a religious confession of its own, "avoid[s] both conflict among religious factions for political authority and the inevitable despotism of the religious faction that won out." Pursuant to this political concept of religion, "'religion' represents that which the new order disclaims: jurisdiction over ultimate truths, a comprehensive claim to undivided loyalty, and a command to worship."<sup>246</sup>

The constitutional distinctiveness of religion – "a sense of boundary between state and some aspects of institutional [religious] behavior" – is rooted in this recognition of the limited nature of the state. There are some aspects of human life that the state simply has no right to control. The constitutional distinctiveness of religion thus serves as a check on totalitarianism, insulating from state control those aspects of the behavior of religious institutions that nurture the spirit directly.<sup>247</sup>

For Lupu and Tuttle, this political doctrine of religion creates a relatively restricted distinctive sphere for religious institutions:

The role of the contemporary state is broad indeed, but it remains circumscribed by its penultimacy. Life's ultimate questions are to be left in private hands, and when those hands are institutional, the state must respect the internal life and self-governance of such institutions. Most importantly, [this] approach is consistent with the duality of roles of religious institutions in contemporary America. When [religious institutions] institutions perform functions indistinguishable from other segments of the nonprofit world, the law should treat them as their secular

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<sup>246</sup> Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in our Constitutional Order*, 47 VILL. L. REV. 37, 84 (2002).

<sup>247</sup> *Id.*

counterparts are treated. When, however, religious institutions act in uniquely religious ways, making connections with the world beyond the temporal and material concerns that are the proper jurisdiction of the state, the legally distinctive qualities of such institutions begin to emerge. It is only by exploring the intrinsic limit on state power to affect these ultimate concerns, rather than by mining the desires, activities or teachings of religious organizations, that the distinctive place of religious entities in our constitutional order can be located.<sup>248</sup>

The ministerial exception finds a secure home within this understanding of the constitutionally protected sphere in which religious institutions function insulated from state control. But can the law articulate principled, workable jurisdictional boundaries for this sphere? And does a workable understanding of religion's sovereign sphere provide adequate protection for the theological principle of the freedom of the church as it is understood by Murray and in the Vatican II Declaration on Religious Freedom?

A jurisdictional line that tries to draw a distinction between claims that implicate "inherently religious activities" and those that do not is not workable – for a theological reason. There is a "religious density" to all things,<sup>249</sup> and the whole world "is charged with the grandeur of God."<sup>250</sup> It is, therefore, not possible to draw precise jurisdictional

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<sup>248</sup> *Id.* at 92.

<sup>249</sup> See Gregory A. Kalscheur, S.J., *Ignatian Spirituality and the Life of the Lawyer: Finding God in All Things – Even in the Ordinary Practice of the Law*, 46 J. CATH. L. STUD. 7, 19-20 (2007).

<sup>250</sup> Gerard Manley Hopkins, S.J., "God's Grandeur," in GERARD MANLEY HOPKINS (THE OXFORD AUTHORS) 128 (Catherine Phillips, ed. 1986). As Karl Rahner explains,

Because God is greater than everything, , God can be found if one flees away from the world, but God can come to meet one on the streets in the midst of the world. For this reason Ignatius acknowledges only one law in his restless search for God: to seek God in all things; and this means: to seek God in that spot where at any particular time God wants to be found, and it means, too, to seek God in the world if God wants to show God's self in it. ... Ignatius is concerned only with the God above the whole world, but he knows that this God, precisely by being really above the whole world and not merely the dialectical antithesis to the whole world, is also to be found *in the world*, when God's sovereign will bids us to enter upon the way of the world.

Karl Rahner, S.J., *Ignatian Mysticism of Joy in the World*, in KARL RAHNER: THEOLOGIAN OF THE GRACED SEARCH FOR MEANING 93-94 (Geffrey B. Kelly, ed. 1992)

lines between the sacred and the secular, or between the spiritual and the temporal.<sup>251</sup> *All* human activity can be understood as having an “inherently religious” dimension.

Accordingly, the constitutionally mandated jurisdictional line must be articulated in other terms. The protected sphere of religion that is beyond the jurisdiction of civil authority might be better defined as the realm of “uniquely religious” activities (Lupu & Tuttle) or the realm of exclusively religious activities (Esbeck). In this realm, religion is sovereign and exercises sole jurisdiction. When religion is doing its own thing, its activities are off limits. But when religious institutions – as they must – embody their religious mission through temporal social service activities that are not uniquely religious (even though they *are* inherently religious), they are engaged in activity that the civil authority has jurisdiction to regulate for public order reasons.

What sorts of claims are jurisdictionally barred by a constitutionally mandated jurisdictional line drawn to protect uniquely or exclusively religious activities? The ministerial exception cases establish a realm of autonomy for church polity and administration, for matters of internal church governance and administration. The selection and dismissal of ministers, and the terms of the ministerial service, fall squarely within this sovereign religious realm. The employment of ministers is a uniquely religious activity; it lies at the core of religion’s own thing.

The constitutionally mandated jurisdictional line exemplified by the ministerial exception does provide significant constitutional protection to the theological principle of the freedom of the church. The question of the appointment of ministers is at the heart of

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<sup>251</sup> See Leslie Griffin, *The Integration of Spiritual and Temporal: Contemporary Roman Catholic Church-State Theory*, 48 THEOLOGICAL STUD. 225, 251 (1987); BERMAN, *LAW AND REVOLUTION*, *supra* note \_\_, at 111 (suggesting that the actual boundaries between the realm of secular authority and that of spiritual authority can not, “by the very nature of the problem, be defined abstractly”); *id.* at 107 (there are likely always to be “disputes at the boundaries of the ecclesiastical and secular powers”)



church autonomy; indeed the question of the role to be played by secular authorities in the investiture of bishops was at the heart of the medieval controversy in which the “freedom of the church” became a revolutionary slogan.<sup>252</sup>

In order for the jurisdictional line that defines the constitutionally protected exclusive jurisdiction of religion to be a workable principle of law, however, it may need to be drawn in a way that limits the sovereign sphere of religion to activities that can be described as uniquely or exclusively activity. Under this jurisdictional framework, much inherently religious activity will inevitably be subject to civil regulation. In order for the church to be the church, it must be able to engage in social service activity in the world. As Murray noted nearly fifty years ago, the freedom of the church must include the freedom to fulfill her “spiritual mission of social justice and peace.”<sup>253</sup> More recently, in his first encyclical, entitled *Deus Caritas Est* (God is Love), Benedict XVI forcefully affirmed that love of God grounds a love of neighbor that must be expressed through ecclesial service to the community. Indeed, such social service activity is a constitutive element of what it means for the church to be church:

[T]he exercise of charity became established as one of [the church’s] essential activities, along with the administration of the sacraments and the proclamation of the word: Love for widows and orphans, prisoners and the sick and needy of every kind is as essential to her ministry as the ministry of the sacraments and preaching of the Gospel. The church cannot neglect the service of charity anymore than she can neglect the sacraments and the word. ... These duties presuppose each other and are inseparable. For the church, charity is not a kind of welfare activity which could equally well be left to others but is a part of her nature, an indispensable expression of her very being.<sup>254</sup>

<sup>252</sup> See BERMAN, LAW AND REVOLUTION, *supra* note \_\_, at 94-113 (discussing the investiture controversy at the heart of the “papal revolution” of the eleventh and twelfth centuries); *id.* at 99 (“The separation, concurrence, and interaction of the spiritual and secular jurisdictions [that was the result of the papal revolution] was a principal source of the Western legal tradition.”)

<sup>253</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note \_\_, at 75.

<sup>254</sup> Benedict XVI, *Deus Caritas Est*, §§22 & 25, 35 ORIGINS 541, 549-50 (2006); see also Brady, *Religious Organizations and Free Exercise*, *supra* note \_\_, at 1697-98 (the activities of Catholic social services

The social welfare services provided by a religious entity like Catholic Charities cannot, therefore, be understood as a simply secular or temporal activity. Instead the concrete human services provided by Catholic Charities are an inherently religious undertaking that expresses the “deepest nature” of the church.<sup>255</sup> At the same time, while the church cannot simply leave this activity to others, there are a range of non-religious groups, as well as the government itself, that provide similar services for non-religious reasons. Thus, the church’s inherently religious ministry of social welfare service falls outside the sphere of the uniquely or exclusively religious. As activity outside of that sphere, it may find itself subject to civil regulation that applies generally to social service providers or to secular employers, and these regulations may be justified by governmental interests that are properly characterized as public order concerns providing a legitimate basis for governmental action.

## 2. Issues Related to Removal and Supplemental Jurisdiction

The question of the jurisdictional status of the ministerial exception can become an issue of practical significance with respect to removal and supplemental jurisdiction. Religious institutions that have been sued in state court by ministers who raise employment discrimination claims that include alleged violations of federal anti-discrimination statutes have on occasion removed those actions to federal court and then invoked the ministerial exception as grounds for dismissal of the action. Because assertion of the ministerial exception is a way of asserting that a court has no subject matter jurisdiction over a ministerial employment discrimination claim, this removal is

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agencies may appear secular, but they are “suffused with religious significance”; “For the Catholic Church, social services activities are no more secular than worship and preaching.”).

<sup>255</sup> *Deus Caritas Est*, #25, *supra* note \_\_, at 550.

improper, because there is no basis for original federal jurisdiction over such a claim.<sup>256</sup>

The federal court, therefore, has no power to dismiss an improperly removed case; the federal court has power *only* to remand the case to state court for dismissal of the barred claim.<sup>257</sup>

Confusion regarding the nature of the ministerial exception seems to have led the court to overlook this consequence of the jurisdictional character of the exception in *Ross v. Metropolitan Church of God*.<sup>258</sup> Mr. Ross, an African American, the former Pastor of Worship Arts of the Metropolitan Church of God, filed an action against the Church in Georgia state court after he was fired by the Church's pastor. The action alleged wrongful termination on the basis of race in violation of 42 U.S.C. § 1981, along with three state law causes of action: breach of contract, breach of implied-in-fact contract,

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<sup>256</sup> See 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”); 16 MOORE’S FEDERAL PRACTICE § 107.14[1] (“An action filed in state court may not be removed unless the federal district courts have jurisdiction of the action.”). Removal might conceivably be proper if the plaintiff’s claims included some ground for original jurisdiction in the district court *other than* the barred federal employment discrimination claim, such as state-law contract claims against completely diverse defendants. Cf. *Schacht*, 524 U.S. at 386 (“[T]he presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction *that would otherwise exist*.”) (emphasis added).

<sup>257</sup> See 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”); 16 MOORE’S FEDERAL PRACTICE § 107.14[3][b][ii] (“Section 1447(c) means that if it is discovered that federal jurisdiction is lacking, at any stage in the proceedings, a removed case must be remanded to state court rather than dismissed.”); *id.* at § 107.41[1][d][ii] (“[T]he district court may not dismiss the case for lack of subject matter jurisdiction, but, rather, must remand the case to state court, even when the district court believes that pursuing the case in state court is futile on the merits.”); *Int’l Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 87 (1991) (“Since the district court had no original jurisdiction over this case, ... a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)) (overruled by statute on other grounds); *id.* at 89 (“the literal words of § 1447(c) ... on their face, give ... no discretion to dismiss rather than remand an action”) (quoting *Maine Assn. of Interdependent Neighborhoods v. Commissioner, Maine Dept. of Human Services*, 876 F.2d 1051, 1054 (1<sup>st</sup> Cir. 1989)); *Parker v. Della Rocco*, 252 F.3d 663, 666 (2d Cir. 2001) (§ 1447(c) “addresses the *consequences* of a jurisdictional flaw, *i.e.*, it mandates a remand rather than a dismissal”)

<sup>258</sup> 471 F. Supp.2d 1306 (N.D. Ga. 2007).

and promissory estoppel. The Church then removed the action to federal court, arguing that the § 1981 claim gave the court federal-question jurisdiction over the case.<sup>259</sup>

After removal, the Church moved to dismiss Mr. Ross's complaint under Rule 12(b)(6), on the ground that his § 1981 claim was barred by the ministerial exception. The court agreed, and dismissed Mr. Ross's § 1981 claim.<sup>260</sup> Because the applicability of the ministerial exception means that the court had no jurisdiction over the subject matter of the claim, the court erred in dismissing the claim, rather than remanding the case to state court.<sup>261</sup> The court then compounded its error by going on to determine whether it should exercise supplemental jurisdiction over Mr. Ross's remaining state law claims, which, as contract claims, were not barred by the ministerial exception.<sup>262</sup> The court concluded that the state-law claims should be remanded to state court, but it analyzed the issue as if retaining jurisdiction over the state law claims was within its power as a matter

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<sup>259</sup> 471 F. Supp.2d at 1307.

<sup>260</sup> 471 F. Supp.2d at 1312.

<sup>261</sup> See 28 U.S.C. § 1447(c) and note \_\_\_, *supra*. The same error is evident in *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9<sup>th</sup> Cir. 2004). In *Werft*, a Methodist minister resigned his position after his church employer refused to accommodate his Attention Deficit Disorder, dyslexia, and heart problems. He filed an action against the church in state court in Arizona. The complaint alleged violations of three federal statutes (Title VII, the Rehabilitation Act, and the Americans with Disabilities Act), and the Arizona Civil Rights Act. The church removed the case to federal district court and then filed a 12(b)(6) motion to dismiss for failure to state a claim on the ground that "the First Amendment precluded civil court review of the Church's ministerial employment decisions." 377 F.3d at 1100. The district court granted the motion, and the Ninth Circuit affirmed. Because the claims implicated the employment relationship between church and minister, the district court "properly dismissed" the claims. 377 F.3d at 1104. If, however, the ministerial exception is properly understood to deprive civil courts of jurisdiction over ministerial employment discrimination claims, this removed action was not properly dismissed; pursuant to 28 U.S.C. § 1447(c) it should have been remanded to state court, and once back in state court, the action should have been dismissed for lack of subject matter jurisdiction.

<sup>262</sup> "While the ministerial exception generally applies to bar state tort claims that require an inquiry into church administrative decisionmaking, it has generally not been held to bar state law contract claims, because 'application of state contract law does not involve government-imposed limits on [a church's] right to select its ministers,' but rather seeks to enforce a purely voluntary promise." 471 F. Supp.2d at 1309 n.2 (quoting *Petruska*, 462 F.3d at 310); see also *Minker v. Baltimore Annual Conf. of the United Methodist Church*, 894 F.2d 1354, 1360-61 (D.C. Cir. 1990) (minister's contract claim not barred by First Amendment so long as adjudication of the claim would not create excessive entanglement with religion).

of discretion under the supplemental jurisdiction statute, 28 U.S.C. § 1367. Under the statute,

in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so *related to claims in the action within such original jurisdiction* that they form part of the same case or controversy under Article III of the United States Constitution.<sup>263</sup>

If, however, the district court dismisses all the claims over which it had original jurisdiction, § 1367(c) provides that the court “may,” in its discretion, “decline to exercise supplemental jurisdiction” over the remaining state-law claims.<sup>264</sup> Because the only federal-law claim in the case had been dismissed in the early stages of the litigation, the court in *Ross* concluded that considerations of comity, judicial economy, fairness, and convenience all favored remanding the contract claims to state court for resolution.<sup>265</sup> Yet in reaching this decision the court seemed to assume that it retained the power under § 1367 to hear and decide the state-law claims if doing so made sense in the interests of judicial economy, convenience, fairness to the litigants, and comity. This power only exists, however, when the court at one point had before it a civil action over which it had original jurisdiction. Because the ministerial exception deprived the district court in *Ross* of original jurisdiction over the § 1981 claim, the court never had supplemental jurisdiction over the related state-law claims, and, therefore, the court never possessed the power, in its discretion, to hear and decide those claims.<sup>266</sup> Its *only* choice was to remand the state-law claims to state court.

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<sup>263</sup> 28 U.S.C. § 1367(a) (emphasis added).

<sup>264</sup> 28 U.S.C. § 1367(c).

<sup>265</sup> 471 F. Supp.2d at 1312-13.

<sup>266</sup> Cf. 16 MOORE’S FEDERAL PRACTICE § 107.14[3][b][ii] (*If federal question jurisdiction exists at the time of removal, but the federal question claim is defeated on the merits, district courts retain discretion to exercise supplemental jurisdiction over state law claims arising from the same case or controversy. ... Once*

A similar situation may arise when a plaintiff chooses to file an action in federal court, joining state law claims to the federal employment discrimination claim that purports to give the federal court original jurisdiction. In *Petruska* for example, Sister Petruska joined several state-law claim to her Title VII sex discrimination claim against Gannon University. The district court dismissed all of her claims for lack of subject matter jurisdiction. On appeal, the Third Circuit, concluded that the ministerial exception did not bar her breach of contract claim; unlike her Title VII claim, the breach of contract claim did not involve government imposed limits on the University's right to select its ministerial employees.<sup>267</sup> Thus, the Third Circuit held that the claims barred by the ministerial exception should be dismissed for failure to state a claim, while the contract claim should be remanded to the district court. That court, the Third Circuit seemed to assume, possessed the power to hear and decide the contract claim *so long as* resolution of the claim would not unduly entangle the court with religious matters in violation of the Establishment Clause by requiring the court to decide doctrinal issues or engage in any inquiry regarding ecclesiastical issues.<sup>268</sup>

If this contract claim is to go forward, however, it should (in the absence of complete diversity) be in state court, not federal court. Because the ministerial exception placed excluded her Title VII claim from the original jurisdiction of the district court, that court never had supplemental jurisdiction over Sister Petruska's state law claims. Thus the district court cannot now retain supplemental jurisdiction to give any further

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*supplemental jurisdiction exists*, it remains, subject to the discretionary provision for remand.") (emphasis added).

<sup>267</sup> 462 F.3d at 310 ("Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights. Accordingly, application of state law to Petruska's contract claim would not violate the Free Exercise Clause.").

<sup>268</sup> 462 F.3d at 312.

consideration to her contract claim, even if it is not barred by the ministerial exception. The Third Circuit's mistake with respect to the jurisdictional character of the ministerial exception led it incorrectly to assume that the district court had power to decide this remaining claim on remand.

#### CONCLUSION

When neutral regulations of general application justified by a public order rationale impose upon the church requirements that conflict with the church's doctrinal commitments, the church's freedom to engage in its ministry is burdened. Because the ministry of social service takes place outside of the exclusive sphere of religion, the freedom of the church seems here to collide with the nature of the free exercise analysis established by the Court in *Smith*. Thus, current constitutional doctrine does allow government to impose restrictions on the freedom of the church when the church is engaged in activity outside of the exclusively religious sphere. Even in the context of state constitutional claims where *Smith* may not apply, the freedom of the church is not entirely secure. Thus, even a return to the pre-*Smith* analysis under the federal constitution's free exercise clause may not provide robust protection to the freedom of the church when it is acting outside its sovereign sphere.

The jurisdictional analysis that this Article examines will not solve that problem. But, given the religious density of *all* things, perhaps it is asking too much to expect the legal principles that flow from the Constitution to provide a simple, clear-cut, easy-to-apply doctrinal rule protecting the theological principle of the freedom of the church. It may not be possible to translate completely that theological principle into the language of

constitutional law.<sup>269</sup> This difficulty, however, makes it all the more critical that we understand and apply the necessarily imperfect translation of that principle that *is* found in the constitutionally mandated jurisdictional limits on civil authority exemplified by the ministerial exception. This jurisdictional limit implements our Constitution's recognition that the state is not the ultimate authority in all things – it embodies the constitutionally mandated principle that some things are above or beyond the jurisdiction of the law precisely because the First Amendment stands as an affirmation of the penultimacy of the state. Thus, clearly and consistently acknowledging this jurisdictional limit might teach us all to treat the claims of religious institutions with respect and sensitivity,<sup>270</sup> even when those institutions pursue their missions through inherently religious activity in the jurisdictional sphere that lies outside of the realm of exclusive religious sovereignty.

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<sup>269</sup> Cf. White, *supra* note \_\_, at 180 (“[O]ne can think of every act of judicial interpretation as a kind of translation, necessarily imperfect, from one world to another, one mind to another.”)

<sup>270</sup> *Id.* at 189 (“in talking in a certain way about the Constitution we make it real”). White explains that the First Amendment calls for “a set of attitudes that will enable us to face and live with the problem it insists upon putting before us, the impossible but necessary task of talking about religion in the language of the law. ... [O]ur hope at the end might be that we could achieve a condition of ‘religious concord’ based not, ... upon contempt, credulity, or cynicism, but upon respect.” *Id.* at 201-02.